

## **LAW REVIEW 1250**

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### **USERRA Applies to Short and Long Periods of Service**

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1.1.1.7—USERRA Applies to State and Local Governments

1.2—USERRA Forbids Discrimination

1.3.1.1—Left Job for Service and Gave Prior Notice

1.3.1.2—Character and Duration of Service

1.3.1.3—Timely Application for Reemployment

1.3.2.12—Special Protection against Discharge, except for Cause

1.4—USERRA Enforcement

1.7—USERRA Regulations

1.8—Relationship between USERRA and other Laws/Policies

**Q: I am an Army Reservist, and I work for a state agency (in my civilian capacity). I recently got a new supervisor in my state job, and he has made it clear that he does not approve of my Army Reserve service. On several occasions, he has told me that I must choose between “playing soldier” and working for the state. I recently did my two weeks of annual training with my Army Reserve unit, from Monday, April 30, through Friday, May 11. I gave my supervisor three months of advance notice of this annual training period, but he refused to give me permission to go. I spoke to the commanding officer (CO) of my Reserve unit, and she told me that a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA) protects my civilian job in these circumstances and that I should report to my annual training as ordered.**

**I worked the full day on Friday, April 27, and I reminded the supervisor I would be away from work the next two weeks for my Army Reserve training. He pointedly told me that I did not have his permission to be away from work and that I would be considered to be absent without permission and to have abandoned my job. On Sunday, April 29, I drove from my home to the place of the Army training. My civilian supervisor called me three times on my cell phone while I was driving, ordering me to turn around and drive back and to be at work on time on Monday, April 30. I finally had to turn off the cell phone so that I could drive safely, without this distraction.**

**I completed my annual training on Friday, May 11, and drove home that evening. Saturday morning, I called my civilian supervisor and told him that I would be back at work at 8:00 a.m. on Monday, May 14, my next regularly**

**scheduled work day. He told me not to come into work because I had already been fired. Relying on my CO's advice, I showed up for work before 8:00 a.m. on Monday morning, but the security guard (as directed by my supervisor) refused to admit me to the office, and he demanded that I turn in my office keys, my state identification card, and my state-owned cell phone, which I did.**

**I called Employer Support of the Guard and Reserve (ESGR), and an ESGR ombudsman contacted the supervisor to suggest that my USERRA rights have been violated. My supervisor told the ombudsman that USERRA does not apply to periods of military service of less than 31 days duration and that in any case state law gives him, as the head of the office, the authority to approve or deny requests for military leave. What gives?[\[1\]](#)**

**A:** Your supervisor is misunderstanding (or more likely intentionally misrepresenting) USERRA. USERRA applies to short periods of military training or service as well as long periods—a period of service can be anything from five hours to five years, and in some cases longer.

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

1. You must have left a position of civilian employment for the purpose of performing voluntary or involuntary “service in the uniformed services.” That phrase is defined in section 4303(13) of USERRA, 38 U.S.C. 4303(13), and “active duty for training” (like what you recently performed) is expressly included in the definition.
2. You must have given the employer prior oral or written notice. It is clear 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. This two-week tour of active duty for training does not even count toward your five-year limit with the state as your employer. See 38 U.S.C. 4312(c)(3).
4. You must have been released from the period of service without having received a disqualifying bad discharge as listed in 38 U.S.C. 4304. It is clear that you were released from the period of service on Friday, May 11, without a bad discharge.
5. You must have been timely in reporting back to work or applying for reemployment.

Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The Secretary promulgated proposed regulations, for notice and comment, in September 2004. After considering the comments received and making some adjustments, the Secretary promulgated the final regulations in December 2005, and those regulations are codified in title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). One section of the regulations is directly on point to your situation:

**§ 1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?**

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.”

20 C.F.R. 1002.87 (bold question in original).

You gave the supervisor advance notice, and that is all that you were required to do. The civilian employer or supervisor does not get a veto on the performance of uniformed service or the absence from the civilian job that is necessitated by such service.

Even if your supervisor is correct that state law gives him discretion to approve or deny your request for military leave, it does not matter, because section 4302(b) of USERRA [38 U.S.C. 4302(b)] provides that USERRA supersedes and overrides a state law that purports to limit USERRA rights or that imposes an additional prerequisite (like supervisor approval) on the exercise of USERRA rights.

It should also be noted that under the United States Constitution federal statutes trump conflicting state statutes and even state constitutions:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

United States Constitution, Article VI, Clause 2.

About a century and a half ago, a great war was fought about the supremacy of federal authority over state authority. State officials in your part of the country sometimes need to be reminded that Ulysses S. Grant did not surrender to Robert E. Lee at Appomattox Courthouse.

After a period of service lasting less than 31 days (like your recent two-week active duty for training period), you are required to notify the employer of your intent to return to your pre-service position of employment "by reporting to the employer—not later than the beginning of the first full regularly scheduled work period following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person [you] from the place of that service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i). You met this requirement when you tried to return to work at 8:00 a.m. on Monday, May 14. The fact that the security guard physically prevented you from entering the work space certainly does not defeat your right to reemployment under USERRA.

When your supervisor asserts that USERRA only applies to periods of service of 31 days or more, he is apparently thinking of section 4316(c), which provides:

**(c)**A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

**(1)**within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

**(2)**within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

38 U.S.C. 4316(c).

Because your period of service lasted only 12 days, there is no special protection period against discharge except for cause, but this does not mean that you do not have the right to reemployment under USERRA. You have the right to reemployment because you met the USERRA eligibility conditions as to prior notice to your employer, the five-year limit, release from service under honorable conditions, and timely attempt to return to work.

Since the very beginning (1940), the reemployment statute has had a provision protecting the returning veteran from discharge, except for cause, for a limited period of time after returning from service and restoration to the civilian job. Early on, the Supreme Court established that the end of the special protection period does not mark the end of the veteran's rights under the reemployment statute. *See Oakley v. Louisville & Nashville Railroad Co.*, 338 U.S. 278 (1949).[\[2\]](#)

Contrary to your supervisor's misunderstanding, there is simply no relationship between the special protection period and your USERRA rights.

**Q: What is to keep the employer from reemploying me and then firing me a few days later?**

**A:** You are protected by section 4311(a), which 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 the uniformed services 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.

38 U.S.C. 4311(a).

Under section 4311(c) [38 U.S.C. 4311(c)], you need not prove that your Army Reserve membership and service were the sole reason for the termination of your employment. It is sufficient for you to prove that your service was a *motivating factor* in the employer's decision. Based on this factual scenario, it seems abundantly clear that, at a minimum, your Army Reserve service was a motivating factor in the employer's decision to terminate your employment.

**Q: The ESGR ombudsman told me that he has closed the ESGR case, because the employer refuses to talk to ESGR. What do you suggest that I do next?**

**A:** I suggest that you file a formal, written USERRA complaint against the employer, with the Veterans' Employment and Training Service of the Department of Labor (DOL-VETS). You can do this on-line at <https://vets1010.dol.gov/>.

After receiving your complaint, DOL-VETS will conduct an investigation and will advise you of the results of the investigation. 38 U.S.C. 4322. If the investigation does not result in resolution of your complaint, you can request that DOL-VETS refer the matter to the Attorney General of the United States, via the United States Department of Justice (DOJ). Upon your request, DOL-VETS is required to refer your case. 38 U.S.C. 4323(a).

If DOJ finds your case to have merit, it can file a case against the employer in the appropriate federal district court. Because in this case the employer-defendant is a state, the named plaintiff in the case will be the United States of America. 38 U.S.C.

4323(b)(1).<sup>[3]</sup>

**Q: If DOJ files suit on my behalf and prevails, what relief can the court award?**

**A:** "In any action under this section, the court may award relief as follows: (A) The court may require the employer to comply with the provisions of this chapter. (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter. (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B), if the court determines that the employer's failure to comply with the provisions of this chapter was willful." 38 U.S.C. 4323(d)(1).

Based on this scenario, there seems to be more than ample evidence of a willful violation of USERRA by your supervisor, on behalf of the state agency. Thus, it is likely that liquidated damages (double damages) will be awarded. Please see [Law Review 206](#) for a detailed discussion of the sorts of remedies that are available under USERRA.

In your case, the named plaintiff will be the United States of America. Thus, DOJ can seek and likely will get relief that is broader than that which you personally could seek in your own lawsuit. That relief should include a court order requiring your supervisor and all other supervisors at that state agency to undergo USERRA training.

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[\[1\]](#) The factual scenario set-up in this article is an amalgamation of several situations of which I am aware, plus some poetic license to make points about how the various provisions of USERRA work together.

[\[2\]](#) I discuss the implications of *Oakley* in detail in Law Review 0823 (May 2008). Please see [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 750 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, 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.

[\[3\]](#) "In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction *in accordance with the laws of the State.*" 38 U.S.C. 4323(b)(2) (emphasis supplied). Unfortunately, state government agencies in your state still have sovereign immunity under the state constitution. Thus, you cannot sue the state in state court. In your situation, the only opportunity for obtaining relief is through a suit brought by DOJ in the name of the United States.