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Reemployment Rights in Student Job on Campus

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Q: I am a volunteer ombudsman for Employer Support of the Guard and Reserve (ESGR). I utilize your Law Review articles to help me understand the Uniformed Services Employment and Reemployment Rights Act (USERRA) and to help me explain it to Reserve and National Guard personnel and their civilian employers. I am asking your help in resolving a new case that has me stumped.

The claimant (let's call him "Joe Smith") has just completed his freshman year at a major university. Back in February, he enlisted in the Platoon Leaders Course (PLC) Program of the Marine Corps, and he will be spending six weeks this summer at Quantico, Virginia for the PLC Junior Program. He expects to be back at Quantico two years from now, in the summer of 2014, for the PLC Senior Program. If all goes well, he will be commissioned a Second Lieutenant in about May 2015, when he receives his undergraduate degree from the university.

This is a private university, and the tuition is very steep. Joe is depending upon a part-time job that he has had at the university library, starting almost immediately after he began classes in September 2011. The university librarian was impressed with Joe's resourcefulness, attention to detail, and computer skills and was planning to use Joe in a major project, scheduled for this summer, to digitize tens of thousands of books in the university library. The librarian was very disappointed when Joe told him, in February, that he had signed up for the PLC Program and would be in Quantico for more than half of the summer term and thus would not be available to work on the digitization project this summer.

The librarian hired another freshman student (let's call her Mary Jones) for the digitization project this summer and has promised her Joe's position in the fall and for the next three years of her undergraduate education at the university. He told Joe that there will be no position for him in the fall because he only has one student assistant position in his budget and Mary is more "reliable" because she is available to work on the digitization project this summer.

Joe and the librarian got into a heated argument. Joe claims the right to return to his job when he completes the PLC Junior Program in late July. The librarian

claims that "stupid Army laws" like USERRA do not apply to the library or to "temporary student jobs." Who is correct?

The librarian has been on this campus almost continuously since September 1969, when he went there as a college freshman. He was part of the radical element that protested against the Vietnam War and drove the Reserve Officers Training Corps off the campus. He has never gotten over that anti-military mindset.

A: The librarian's asserted USERRA exemption does not exist. As Commander Wayne Johnson explained in Law Review 1052,[1] USERRA does not apply to the relationship between a student and a university, because this is not an employee-employer relationship, but in 2008 Congress enacted USERRA-type protections for post-secondary students under section 1091c of title 20 of the United States Code, 20 U.S.C. 1091c. If the library job is considered employment, Joe has the right to return to the job under USERRA. If the library job is considered to be part of Joe's financial aid package as a student, Joe has the right to return to the job under 20 U.S.C. 1091c. Either way, the university is violating federal law if it denies him the job.

As I explained in Law Review 0766 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

1. Must have left a position of employment for the purpose of performing voluntary or involuntary service in the uniformed services. Joe's six week PLC Junior course most definitely qualifies as "service in the uniformed services" as defined by 38 U.S.C. 4303(13).
2. Must have given the employer prior oral or written notice. It seems clear that Joe gave such notice to the librarian in February 2012, shortly after he enlisted in the PLC Program.
3. Cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, does not exceed five years. Joe's six-week PLC Junior course does not count toward his five-year limit with the university. See 38 U.S.C. 4312(c)(3). But even if it did count, Joe is not in any danger of exceeding the five-year limit.
4. Must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge that disqualifies the individual under 38 U.S.C. 4304. Joe will meet this criterion in late July, unless he does something incredibly stupid at the PLC Junior course (like assaulting the drill instructor).
5. Must have made a timely application for reemployment, after release from the period of service.

After a period of service of more than 30 days but less than 181 days, the service member must apply for reemployment, with the pre-service employer, within 14 days after release from the period of service. 38 U.S.C. 4312(e)(1)(C). You should advise Joe to apply for reemployment, by certified mail, immediately after he completes the PLC Junior training in late July. He should send certified letters to the librarian, to the university president, and to the university's legal department.

It may seem futile to apply for reemployment, since the librarian has already told Joe that there is no job for him, but tell Joe to apply anyway. It is a lot easier to send three certified letters than it is to argue in court that the "futility doctrine" exempts Joe from the obligation to make a timely application for reemployment after release from the period of service.

If Joe applies for reemployment on July 31 and meets the five eligibility criteria at that time, the university has a legal obligation to reemploy Joe promptly[2]and *even if reemploying Joe means displacing Mary.*[3]

Congress enacted USERRA (Public Law 103-353) on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. Under the VRRA, the returning veteran was required to prove, as an eligibility criterion for reemployment, that his or her pre-service job was "other than temporary."[4]

Under USERRA, it is not necessary for the service member or veteran to prove that the pre-service job was "other than temporary." There is an affirmative defense available to the employer, if the employer can *prove* (not just say) that "the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely *or for a significant time.*" 38 U.S.C. 4312(d)(1)(C) (emphasis supplied).

Joe did not have a reasonable expectation that his library job would continue "indefinitely," but he did have a reasonable expectation that it would continue "for a significant time." It appears that Joe had a reasonable expectation that his job would continue for three more years, until his expected graduation from the university. Thus, it appears that the university will not be able to support the affirmative defense, under 38 U.S.C. 4312(d)(2)(C).

I think that the university has a clear legal responsibility to reemploy Joe promptly after he completes the PLC Junior training in late July.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 754 articles about USERRA and other laws that are especially 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.

[2] The Department of Labor (DOL) USERRA Regulations provide: "Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment." 20 C.F.R. 1002.181. If Joe applies for reemployment on July 31, he should be back on the payroll by mid August.

[3] *See* 20 C.F.R. 1002.139(a).

[4] The returning veteran was not required to prove that the pre-service job was "permanent"—only that it was "other than temporary." There is a difference. It is like the difference between telling your wife that she is "beautiful" and telling her that she is "other than ugly."