

Law Review 1272

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USERRA Covers Time Away from Work for Examination to Determine Fitness to Enlist

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1.1.1.2—USERRA Applies to Small Employers

1.1.3.2—USERRA Applies to Regular Military Service

1.3.1.1—Left Job for Service and Gave Prior Notice

Q: I work for a small store, with only 12 employees. I am trying to join the Army. I met with an Army recruiter, and he scheduled me for an examination at the Military Examination and Processing Station (MEPS), 500 miles away. The examination required me to miss two days of work at the store, to include traveling to the MEPS, the exam itself, and returning home. I gave the store owner a week of advance notice, which was all the notice that I received from the recruiter.

The store owner told me that I could have the two days off, but only if I found a replacement. I tried to persuade my colleagues at the store to fill in for me, but they all refused. I reported to the MEPS, as directed by the recruiter. I fully expected to pass the physical and to enlist and report to boot camp shortly thereafter. I was shocked to learn from the MEPS that I have “latent diabetes” and that I am not medically qualified to join the Army or any branch of the armed forces.

I reported back to the store early in the morning on the next business day, and the store owner told me that I had been fired for missing work without finding a replacement. Now, I have neither a civilian job nor the Army. Have my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) been violated?

A: Yes. It appears that you met the five conditions to have the right to reemployment under USERRA. You left a position of civilian employment for the purposes of performing “service in the uniformed services” and you gave the employer prior notice. You have not exceeded the five-year limit, and you did not receive a disqualifying bad discharge. You reported back to work in a timely manner, after you completed the service. The employer violated USERRA by denying you reemployment (in effect firing you).

USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). Section 4303 defines 16 terms used in this law, including the term “service in the uniformed services” which is defined as follows:

“(13)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).

Regardless of the outcome of the examination, the time that you were away from work for purposes of the examination qualifies as “service in the uniformed services” under USERRA. Under section 4312(a)(1), you were required to give the employer advance notice, and you gave such notice. You did not need the employer’s permission to absent yourself from work for purposes of a fitness examination or any other form of service in the uniformed services, and the employer had no right to demand that you find another employee to cover your work in

your absence. I invite your attention to my Law Review 1180, dated October 2011 and titled “It Is Not Your Responsibility to Find a Replacement.”[\[1\]](#)

Q: The employer insists that USERRA only applies to members of the National Guard and Reserve. He said that this law does not apply to me because I was not a member and was not seeking to become a member of the National Guard or Reserve. What do you say about that?

A: USERRA most definitely applies to the regular military, as well as the National Guard and Reserve. Please see Law Review 0719 (May 2007).

Q: The store owner insists that USERRA and other federal employment laws only apply to employers with 15 or more employees. He said that the store has never had more than 13 employees and that USERRA does not apply to him. What do you say about this?

A: USERRA has no such threshold. You only need one employee to be covered by USERRA. See Law Review 1019.

Note to Readers: USERRA most definitely gives you the right to time off from your civilian job for an examination to determine your fitness to enlist, either in the regular military or the National Guard or Reserve, but I recommend that you not utilize this right, unless doing so is essential. I recommend that you ask the recruiter to schedule your MEPS appointment for a day when you are not scheduled to work at your civilian job or that you use a day or two of vacation or compensatory time for the MEPS examination.

I recommend that you go out of your way to keep secret the fact that you are considering joining the military, whether Active Component or Reserve Component. My concern is that your civilian employer will consider it “disloyal” for you to consider or apply for the military. The employer may be tempted to discriminate against you with respect to training opportunities, promotions, or even layoff. Such discrimination is unlawful under section 4311 of USERRA, but it happens every day, and if the employer is clever it may be difficult to prove.

You have no obligation to inform the employer that you are considering enlisting. You may change your mind and decide not to enlist, or you may be found unfit to serve, as happened in this case. You have no obligation to give your employer any notice until the first time that you will need to be away from work for service.

Before you leave your job for service, you should give the employer notice that you are leaving for that purpose, even if you think that it is most unlikely that you will ever seek to return to that job. The point of USERRA is to keep the pre-service job behind you as an unburned bridge. Do not burn that bridge by failing to give notice.

[\[1\]](#) I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 772 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.