Law Review 1290

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You only Need one Employee to Be an Employer for Purposes of USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)

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Q: I was hired by Bob's Diner, as the cook, in 2009. In 2011, I joined the Marine Corps Reserve. When I told Bob, the owner, that I had joined, he was very angry. He told me that I had no right to sign up with another employer (the Marine Corps) without his permission and that if I had asked him he would not have permitted me to enlist. I gave Bob months of advance notice that I would be leaving in March to report to "boot camp" at San Diego, California. He told me that I would not be welcome to return to work at Bob's Diner.

In March, I reported to boot camp as scheduled, and I recently completed my initial training. I am now a member of a Marine Corps Reserve unit. I must drill with the unit one weekend each month, and the unit expects to be called to active duty, for deployment to Afghanistan, sometime in 2013.

Just three days after I was released from my Marine Corps training and returned home, I visited Bob's Diner and spoke to Bob. I gave Bob a copy of my DD-214 and other paperwork showing that I had completed my military training successfully, and I told Bob that I want to go back to work at Bob's Diner. He told me to "pound sand." He said that he has hired a new cook and that the diner only needs one, and that the new guy is more dependable because he does not want to "play soldier."

I am diligently seeking work elsewhere, but I read in the local newspaper that here in Riverside, California there are seven job applicants for every job opening. My likely mobilization in 2013 makes me even less attractive to prospective employers. Help!

A: It appears to me that you meet the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA)[1] and that Bob has violated federal law by denying you your job back. As I explained in Law Review 1281 (August 2012) and other articles,[2] you must meet five conditions to have the right to reemployment in your pre-service civilian job:

1. You must have left the job for the purpose of performing service in the uniformed services. It seems abundantly clear that you did this.
2. You must have given the employer prior oral or written notice, which you did.
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. Your initial active duty training does not count toward your five-year limit with Bob's Diner. See 38 U.S.C. 4312(c)(3).
4. You must have been released from the period of service without having received the sort of bad discharge that disqualifies you from reemployment under section 4304 of USERRA, 38 U.S.C. 4304. Your DD-214 shows that you completed your training duty honorably.
5. You must have made a timely application for reemployment, after release from the period of service.

After a period of service of 31-180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of 181 days or more, you have 90 days. 38 U.S.C. 4312(e)(1)(D). When you visited

Bob and told him that you wanted to return to work, just three days after you were released from the Marine Corps duty, you made a timely application for reemployment, regardless of whether the period of service had passed the 180-day mark.

Because you met the five conditions, Bob was required to reemploy you promptly, and certainly within two weeks after you applied for reemployment. Title 20, Code of Federal Regulations, section 1002.181 (20 C.F.R. 1002.181).

The fact that Bob has hired another cook (Joe Smith) and prefers Joe in no way defeats your right to reemployment at Bob's Diner. There are circumstances where USERRA requires the employer to displace the replacement to reemploy the returning veteran, and this appears to be one of those cases.

Allowing the hiring of another employee to defeat the reemployment rights of the returning veteran would render the reemployment statute largely meaningless, and it is clear that the lack of a current vacancy does not defeat the right of the veteran to return to his or her rightful position. This is established in the 1993 case styled *Nichols v. Department of Veterans Affairs:*

> The department [Department of Veterans Affairs, employer in the case] first argues that, in this case, Nichols' [the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.

Nichols v. Department of Veterans Affairs, 11 F.3d 160, 163 (Fed. Cir. 1993).

Q: I called Bob to reiterate my request for reemployment, and I told him about USERRA. He told me that he had checked with his lawyer and that the lawyer told him that federal laws like USERRA only to apply to employers with 15 or more employees. Bob said that the diner has never had more than 12 employees and currently has only nine, including just one cook. Is Bob's lawyer correct?

A: No. Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and other federal laws governing employment apply to employers with 15 or more employees. The reemployment statute has never had such a threshold of applicability. You only need one employee to be an employer subject to USERRA requirements.

Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. The VRRA never had a threshold of applicability, based on the size of the enterprise or the number of employees, and USERRA's legislative history makes clear that Congress intended that there would be no such threshold under USERRA: "This chapter [USERRA] would apply, as does current law, to all employers regardless of the size of the employer or the number of employees. *Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992)." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.

Cole v. Swint is a 5th Circuit[3] decision under the VRRA. Dr. Richard B. Swint, a physician, owned and operated a ranch and had two employees, including James B. Cole. Cole joined the Army National Guard and requested a Saturday off from his civilian job in order to report to his National Guard drill weekend, in August 1986. Dr. Swint told him that he could not have the Saturday off. Cole reported to his National Guard drill anyway, and Dr. Swint fired him.

Shortly thereafter, Cole reported to his initial active duty training in the National Guard. Upon completing that training, he made a timely application for reemployment with Dr. Swint. Swint refused to reemploy Cole, because the position had been filled. Both the district court and the 5th Circuit firmly held that the fact that the position had been filled did not excuse Swint from the obligation to reemploy Cole. The 5th Circuit held, "If mere replacement of the employee would exempt an employer from the Act [VRRA], its protections would be meaningless."

The district court and 5th Circuit also firmly rejected Swint's argument that he was exempt from the VRRA based on the tiny size of his ranch enterprise: "Swint argues that the Act does not apply to small or 'casual' employers. The Act does not have a threshold business size for coverage, unlike many other acts which incorporate such limiting provisions such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e. Swint offers no support for this argument other than those already asserted in his argument about the 'impossibility' of reemploying Cole. We see no need to imply a restriction on the Act's coverage based upon business size."

I did an electronic LEXIS[4] search on *Cole v. Swint*. I found many subsequent VRRA and USERRA cases that have cited the case with approval, and no cases that have criticized or overruled this case. It is clear that *Cole v. Swint* is still good law, both as to "replacement is not a defense" and as to "small size is not a defense."

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, the Secretary published proposed USERRA regulations in the *Federal Register*. After considering the comments received and making a few adjustments, the Secretary published the final USERRA regulations in December 2005. The regulations are published in the Code of Federal Regulations (C.F.R.) in Title 20, Part 1002.

The USERRA regulations address squarely the issue of whether very small employers are exempted from USERRA coverage: "USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act." 20 C.F.R. 1002.34(a).

Q: I have read that there is a bill pending in Congress, and likely to pass, that would exempt small employers from USERRA coverage. Is that true?

A: No. I have heard of this rumor from several folks, which is why I have chosen to address this issue at this time. The rumor apparently refers to H.R. 3860, introduced by Representative John Garamendi of California and Representative Bobby Rush of Illinois. Instead of narrowing protections under USERRA, this Garamendi-Rush bill would broaden and strengthen them. It is not surprising that this bill has caused confusion, because several of the media articles about it have been flat wrong. Even the Congressional Research Service summary of the bill, available through the "Thomas" legislative research site run by the Library of Congress, is misleading. Accordingly, let me explain what H.R. 3860 would do, and what it would not do.

As I explained in detail in Law Review 1290, section 4313(a)(3), 4313(a)(4), and 4313(b)(2)(B) of USERRA deal with the situation of the returning veteran who meets the USERRA eligibility criteria but who is not qualified to return to the position of employment that he or she would have attained if continuously employed because of a disability incurred or aggravated during the period of service or because of some other reason, like great technological change during the time that the veteran was away from work for service. In this situation, the employer is required to make reasonable efforts to qualify the returning veteran for that position. If the veteran cannot become qualified through reasonable employer efforts, the employer must reemploy the veteran in some other position for which he or she is qualified (or can become qualified with reasonable employer efforts) and that provides like seniority, status, and pay, or the closest approximation that is feasible in view of the circumstances. These are very valuable rights for some wounded warriors who are returning to their pre-service civilian employers, under USERRA.

Under section 4312(d)(1)(B) of USERRA [38 U.S.C. 4312(d)(1)(B)], the employer can be exempted from this requirement if the employer can prove that these accommodations would impose an "undue hardship" on the employer. This is a very narrow affirmative defense for which the employer bears a heavy burden of proof.

Section 4312(d)(1)(B) currently reads: "An employer is not required to reemploy a person under this chapter if-- … (B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer."

If enacted, H.R. 3860 would amend section 4312(d)(1)(B) to read: "An employer is not required to reemploy a person under this chapter if-- … (B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4),

or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer *if such employer is a small business concern*." (The italicized language is the proposed new language that H.R. 3860 would add.)

Section 4312(d)(2)(B) currently reads: "In any proceeding involving an issue of whether-- … (B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, … the employer shall have the burden of proving the … undue hardship …"

If enacted, H.R. 3860 would amend section 4312(d)(2)(B) to read: "In any proceeding involving an issue of whether-- … (B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer *if such employer is a small business concern*, … the employer shall have the burden of proving the … undue hardship …" (The italicized language is the proposed new language that H.R. 3860 would add.)

Under current law, small, medium, and large employers have the opportunity to try to prove the "undue hardship" affirmative defense. If H.R. 3860 were enacted, only a "small business concern"[5] would have the opportunity to try to prove this affirmative defense. Thus, H.R. 3860 would narrow this already very narrow affirmative defense and would expand (not contract) USERRA coverage.

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[1] USERRA is codified in title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-4335).

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 791 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.

[3] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

[4] LEXIS is a computerized legal research tool that we subscribe to here at ROA.

[5] H.R. 3860 would also amend section 4303 of USERRA, the definitions section, to add a new 17th defined term—"small business concern." The proposed new definition is as follows: "The term 'small business concern' has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632)." This refers to the definition of "small business concern" that governs eligibility for privileges and programs for small businesses that are administered by the Small Business Administration.