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USERRA's Protection against Post-Reemployment Firing

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1.3.2.12—Special Protection against Discharge except Cause

Q: I am a Captain in the Army National Guard and a member of ROA. I went to work for a company I will call Daddy Warbucks International (DWI), an intermediate sized defense contractor, in 2005, as an information technology professional (ITP). For as long as I have worked for DWI, I have received a hard time from my DWI supervisors, concerning the time that I am away from work for Army National Guard training and service.

DWI has about 1,000 employees, organized in work groups of 10-50 employees each. The company has several major defense contracts and a bunch of smaller contracts. DWI has always been a non-union company, and employees are brought on and let go frequently, as contracts are acquired or lost, without much regard to seniority.

Along with my unit, I was involuntarily called to active duty, from January 2011 to July 2012. I gave my DWI supervisor and the DWI personnel office four months of advance notice, in September 2010. They told me, more than once, that it was disloyal for me to leave the company in the lurch to go "play soldier" in Afghanistan. When I told them that I was being involuntarily called to active duty, they did not want to hear that—and they said that I never should have volunteered for the military in the first place. They also told me that the technology is moving so fast in the ITP world that it would be impossible for me ever to catch up after being away for 18 months of military service.

I was released from active duty on July 31, 2012 and applied for reemployment the next day. I returned to work on Monday, August 13. Just a month later, the company announced that one of its major defense contracts is expiring at the end of the fiscal year (September 30) and is not being renewed. The company announced that a 10% staff cut, from 1000 to 900, would be required.

The staff cut list just came out, and my name is on the list. No work group was abolished, but each work group suffered a loss of one to nine employees. My work group consisted of 14 employees, and I am the only one being let go. The company has provided no explanation of how the 100 individuals or positions were selected for elimination.

I was told that the Uniformed Services Employment and Reemployment Rights Act (USERRA) protects me from discharge, except for cause, for one year after my reinstatement. I have filed a claim with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and that agency sent a letter to DWI about my claim. The company's attorney responded, denying that it has violated USERRA, but the company's attorney has steadfastly refused to provide any information about how employees were selected to be let go in the most recent cutback.

I have read your "Law Review" articles about USERRA. What do you think? Am I required to prove that the company selected me for layoff because they are annoyed with me for my Army National Guard service? Or is the burden of proof on the company to prove that I was let go "for cause?" What does "cause" mean in this context?

A: For purposes of this answer, I am assuming that you met the USERRA eligibility criteria for reemployment. You left your DWI job for the purpose of performing service in the uniformed services, and you gave the employer prior oral or written notice. You did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to your employment relationship with DWI. Since your most recent period of service was involuntary (mobilization), it does not count toward your five-year limit. 38 U.S.C. 4312(c). You were released from the period of service without having received the sort of bad discharge that would disqualify you under 38 U.S.C. 4304. After you were released from the period of service, you made a timely application for reemployment. Because you met the USERRA eligibility criteria, the employer was required to reemploy you promptly, and it is unlawful for the employer to discharge you, except for cause, during the special protection period.

Section 4316(c) of USERRA provides: "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).

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 USERRA regulations and published them in the *Federal Register* on Dec. 19, 2005. Those regulations can be found in title 20, Code of Federal Regulations, Part 1002. Those regulations provide as follows about the kind of "cause" that justifies discharging a recently returned veteran during the special protection period:

"The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons. (a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge. (b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off." 20 C.F.R. 1002.248.

It is clear that the employer has the burden of proof, to show that your discharge was "for cause" but the employer is not required to prove that you were guilty of misconduct. Alternatively, the employer can prove that you were selected for discharge "based on the application of other legitimate nondiscriminatory reasons."

A system of seniority governing layoffs could be an example of "the application of other legitimate nondiscriminatory reasons." Your case would be much simpler if DWI were a unionized company, with a collective bargaining agreement (CBA) governing layoffs. In such a situation, it would likely be easy to determine, based on your hire date and your place on the seniority roster, whether your number would have come up for discharge in the September 2012 drawdown even if you had not been called to the colors from January 2011 to July 2012. If the answer to that question were yes, then your USERRA complaint about the discharge would clearly be without merit.

Because DWI is not unionized, and because there is no CBA and the recent layoffs were not based on seniority with DWI, your case is much more complicated. The burden of that complexity falls on DWI, not on you. The company will be required to prove (potentially to a jury) that you would have been selected for the recent round of layoffs even if you had not been called to the colors recently. I think that it is unlikely that DWI will be able to meet this heavy burden of proof.

Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. The VRRA also had a "special protection against discharge" provision. Under the VRRA, the period of special protection was one year after active duty and six months after initial active duty training. USERRA tinkered with the duration of the special protection period and the way that the duration is to be computed but otherwise left this provision essentially unchanged. USERRA's legislative history explains the purpose and effect of this provision as follows:

"Section 4315(d) [later renumbered as 4316(d)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. … Under this provision, the protection would begin only upon proper and complete reinstatement. *See O'Mara v. Peterson Sand & Gravel Co.,* 498 F.2d 896, 898 (7th Cir. 1974).

The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement. As expressed in *Carter v. United States,* 407 F.2d 1238, 1244 (D.C. Cir. 1968), 'cause' must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice, express or fairly implied, that such conduct would be notice [presumably 'cause' was intended] for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario,* 796 F. Supp. 166, 172 (E.D. Pa. 1992).

The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v. Louisville & Nashville Railway Co.,* 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the 'escalator' principle would have eliminated a person's job or placed that person on layoff in the normal course."

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2468.

Section 4316(c) of USERRA offers valuable protections to the returning veteran, especially a returning veteran in your situation.

I hope that this information is useful to you. Please let me know how your case turns out.