Law Review 1299

October 2012

There's a Hole in USERRA. Will States Fill it if Congress Won't?

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Despite nearly everyone's best intentions, discrimination against members and veterans of the armed services can and does happen. Recognizing this, the Congress has long prohibited such discrimination, most recently in the 1994 Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which outlawed such discrimination in new hire, ongoing employment and rehire situations. For the most part, the law has worked well with respect to ongoing employment and reemployment cases, where there is obvious economic harm from loss of a job. But when it comes to enforcing the clear public policy of dissuading employers from discriminating against military personnel when making first-time hiring decisions, USERRA has a gaping hole that needs to be filled: the lack of an effective damages remedy for a refusal to hire.

Discrimination against armed services personnel in ongoing employment and reemployment situations is normally not considered to be driven by prejudice against members of the military. It is perceived as simply business. When employees are absent for weeks, months, or years, even for a commendable purpose, someone has to do their jobs. In addition, when an employee absent on military leave returns to work, it is not always easy to slide that employee back into the same role as before the leave began. Frustration with the inconvenience caused by the employee's absence, together with the difficulty of re-assimilation following leave, often leads to termination—in large part to avoid the same type of interruption occurring again in the future.

Even more problematically, however, concerns lead employers who anticipate that a job applicant may be gone for extended periods of time for military service to be reluctant to hire that person because it could have a negative impact on their business.

The difficulties caused by absentee employees is one example of why, in nearly every circumstance, public policy at both the federal and state level is to allow employers to hire and fire personnel "at will," without government interference. But there are some limited situations where public policy has come down on the side of the employee, and for good reason veterans' rights is one of them.

The case for not allowing discrimination against veterans is fairly obvious and goes beyond patriotism. It is in every citizen's best interest to encourage people to serve their country in the military, and the prospect that a person will either lose his or her job as a result of military service, or be unable to find a job at all upon completion of such service or in anticipation of such service, is a serious disincentive to enlisting in the armed services. In addition, perceived discrimination against veterans can have a tangible effect on the morale of those continuing to serve.

By enacting USERRA, the federal government reiterated that these concerns trump the normal preference for at-will employment. With only limited qualifications, USERRA requires reemployment of service members after their military service is completed at the same jobs they left behind with the same benefits and seniority they would have had if they never left. It also prohibits discrimination against them when making hiring and ongoing employment decisions and prohibits retaliation against them for invoking their rights under USERRA.

One or more states, including Texas as an example, have enacted similar statutes, which provide explicit evidence that states agree with the public policy decision made by the federal government. In Texas, Section 431.017 of Title

4, Subtitle C of the Texas Government Code states that members of the Texas National Guard and other state military forces who are called to active state duty by the Governor are entitled to the same benefits and protections as USERRA provides to members of the national military forces. In addition, Section 431.006 provides that an employer may not terminate the employment of any member of the Texas state military forces (or the military forces of any other state) because the employee is called up to authorized training or duty, and that, upon return, the employee is entitled to the same job, benefits, seniority, and other rights as he or she had upon taking leave. By its terms and its title, however, this section appears to apply only to reemployment and ongoing employment—rather than new hire—situations.

With respect to the prohibition of wrongful termination and denial of reemployment, USERRA and the related Texas statutes seem to be serving their purpose fairly well. There has been significant publicity regarding the rights of service members, including members of the National Guard, to return to their jobs and receive the benefits and seniority they would have received but for being called to active duty. In addition, a large number of reemployment and wrongful termination claims have been brought under USERRA because the employee/member of the military has a lot to gain by winning such a suit—they get their old job back, as well as lost wages, benefits and reinstated seniority. In the case of willful discrimination, they may also receive liquidated damages in the same amount.

In contrast to the plethora of wrongful termination and reemployment claims, however, there has been a dearth of "refusal to hire" discrimination claims under USERRA. Both intuition and almost two decades of USERRA experience reveal the reason for this dichotomy—there is simply not enough incentive under USERRA and the similar Texas statutes to make it worthwhile for a potential employee to sue his or her potential employer. The best that can happen is the employee will be placed in a new job with a new employer that didn't want to hire him or her and receive lost wages and benefits (double in the case of willful discrimination) going back to the time of the hiring decision. If there is doubt about whether the individual would have been hired but for his or her military service, or the individual soon finds another job, the case for liability and damages may be difficult to prove. So even in the case of blatant discrimination, most will determine it's just not worth the hassle of a lawsuit, and employers realize this.

The result is a conundrum. Even though a well-publicized law exists that ostensibly promotes the rights of armed services personnel, the law seems illusory for those looking for a new job. This contradicts the clear public policy of protecting military personnel from employment discrimination, and begs the question of how to cure this defect in the law.

The need is for a remedy that provides employers with a serious incentive to avoid discriminating against military personnel in new hire situations. The best way to achieve this result is to provide a remedy that includes punitive and compensatory damages, which will serve the dual purposes of causing an employer to think twice before rejecting a job candidate due to military service, and providing the appropriate incentive for a legitimate victim of discrimination to bring a claim.

The most obvious vehicle for providing such a remedy would be an amendment to USERRA to allow for punitive and compensatory damages similar to those allowed under Title VII (which provides for a sliding scale of compensatory and punitive damages depending on the size of the employer's business). But given the infamous difficulty the Congress now has in passing new laws, including the difficulty in getting Congress to amend USERRA last year to permit harassment claims (without providing a compensatory damages remedy for harassment) as well as the large influx of military personnel set to return to civilian life from active duty in Afghanistan (and continuing to return in large numbers from Iraq), Texas may not want to wait for the federal government to act.

In fact, Texas Government Code Section 431.006 already includes a compensatory and punitive damages remedy along the same lines as Title VII of the Civil Rights Act of 1964. However, it only clearly applies in ongoing employment and reemployment discrimination cases, and to state military forces, so it would have to be amended to include refusal to hire cases and all military personnel might be called to duty.

An even broader state solution is possible, however, because USERRA was not meant to be exclusive. While USERRA does say that a state may not limit the protections of the statute, it does not say that a state may not expand them, but specifically permits such expansion. In fact, a state's ability to provide remedies that go beyond USERRA was recently confirmed by the U.S. District Court for the Western District of Pennsylvania in the case of *Hamovitz v. Santa Barbara*. Therefore, Texas and other states could change their laws paralleling USERRA -- in the case of Texas, Government Code Section 431.006 -- to cover discrimination against all military services personnel, whether national or state, as well as address refusal to hire cases and allow compensatory and punitive damages.

The other possibility—which *Hamovitz v. Santa Barbara* also opened the door to—is that the Texas courts could mold a new public policy exception to the at-will employment doctrine covering discrimination against military personnel. This would solve the USERRA refusal to hire conundrum by likewise allowing compensatory and punitive damages under state tort law.

In Texas, the Texas Supreme Court has been reluctant to create new exceptions to the at-will employment doctrine. In fact, it has only done so once, when it ruled that a state tort claim could be brought by an employee fired for refusing to engage in criminal activity. However, the court signaled in that case and others that it is willing under the proper circumstances to allow non-statutory employment discrimination claims where public policy clearly requires such an outcome. There is a strong case to be made that the clear public policy of protecting our military personnel from employment discrimination deserves judicial protection through the creation of a new exception to the at-will employment doctrine. If the courts in Texas and elsewhere don't do this, then the legislatures should (and vice versa). Every legislator, judge, and citizen would have to agree that leaving the members of our armed services subject to employment discrimination when looking for a new job, without an adequate remedy, is not an acceptable state of affairs.

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