Number 121, April 2004:

Re-employment of Disabled Veterans

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Q: I am a retired Colonel and a life member of ROA. I have enjoyed reading your Law Review articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), but I never thought that USERRA would apply to my family. After the September 11 atrocities, however, my son left his civilian job at our city government to enlist in the Army. He was seriously injured in Iraq in April 2003, and he has lost his left leg. He was medically retired from the Army and is now at a VA hospital for recuperation and rehabilitation. He has been fitted for a prosthetic leg, and he has undergone extensive rehabilitation. He expects to be released from the VA hospital soon. Does my son have rights under USERRA?

A: Yes. USERRA applies to anyone who leaves a civilian job for voluntary or involuntary service in the uniformed services. It applies to the Active components as well as the Reserve Components. If your son meets the USERRA eligibility criteria, he has the right to re-employment with his pre-service employer. Your son must have left his job for the purpose of service, and he must have given the employer prior notice that he was leaving for the purpose of service. His period of service is clearly within the five-year limit, and he was released from service under honorable conditions. He must make a timely application for re-employment.

Because his period of service was for more than 180 days, your son has up to 90 days to submit his application for re-employment. See 38 U.S.C. 4312(e)(1)(D). The 90-day period starts at the end of the period necessary (up to two years) for hospitalization and convalescence. [See 38 U.S.C. 4312(e)(2)(A).] It is time for your son to re-establish communications with his pre-service employer.

USERRA provides as follows concerning the employer's obligation to the returning disabled veteran: "In the case of a person who has a disability incurred in, or aggravated during, such service and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or (B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with the circumstances of such person's case." [38 U.S.C. 4313(a)(3)(emphasis supplied).]

The concept of "reasonable [employer] efforts to accommodate the disability" was borrowed from the Americans with Disabilities Act (ADA), which requires employers generally to make accommodations for disabled persons, including but not limited to disabled veterans. There is a substantial overlap between the ADA and USERRA regarding returning disabled veterans.

Please remember, however, that the ADA only applies to employers with at least 15 employees, while USERRA has no such threshold. You only need one employee to be an employer for purposes of the re-employment statute. [See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992).] Small companies are exempt from the ADA but not from USERRA.

USERRA's legislative history elaborates on Section 4313(a)(3), as follows: "Section 4313(a)(3) would address the issue of the position to be granted a serviceperson disabled while in military service, regardless of length of service, and who is not qualified for the 'escalator' position [position he or she would have attained if continuously employed] after reasonable efforts to accommodate the disability. That obligation would be to re-employ the returning servicemember in an equivalent position in terms of seniority, status and pay for which the person is qualified or can become qualified with reasonable efforts by the employer. If no such position exists, the nearest approximate position in terms of seniority, status and pay would be required to be found. If a position other than the 'escalator' position is offered to a returning disabled servicemember, full company seniority is always to be accorded the disabled serviceperson, regardless of whether seniority follows an employee under other circumstances. See Hembree v. Georgia Power Co., 637 F.2d 423 (5th Cir. 1981); Ryan v. City of Philadelphia, 559 F. Supp. 783 (E.D. Pa. 1983), affirmed, 732 F.2d 147 (3rd Cir. 1984)." House Report No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2464-65.

I suggest that you contact your son's pre-service employer, on his behalf, to explore the job opportunities. If there is no reasonable accommodation that would enable your son to do his pre-service job, you and the employer should discuss alternative job opportunities. Your son is entitled to vocational rehabilitation from the VA. You, your son, and the employer should identify a position for which your son can become qualified, and then your son should select a form of vocational rehabilitation that is consistent with that position.

Q: When my son left his job to join the Army, in December 2001, he submitted a letter of resignation. His intent at the time was to make the Army his career, and he expressed that intent to his immediate supervisor and the city's personnel director. Does the resignation letter defeat my son's right to re-employment?

A: No. The resignation letter does not defeat his right to re-employment. (Please see Law Review 63, titled "Effect of Resignation.") Your son was only

required to inform the employer, before leaving the job, that he was leaving for the purpose of performing service in the uniformed services. He clearly did that when he told the supervisor and the personnel director that he was joining the Army.

Also, his career plan in December 2001 is irrelevant to his re-employment rights. That plan was disrupted by the injury and the disability. USERRA preserves your son's right to return to his pre-service job, as an "unburned bridge" behind him. Now that the situation has changed, your son has every right to turn around and walk back across that bridge. This is exactly the kind of situation that Congress had in mind when it enacted the re-employment statute in 1940 and when it updated that law in 1994. ROA

*Military title used for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Labor (DoL), or the U.S. government. Past Law Reviews can be found on the ROA Web site. The best way to reach Captain Wright is by e-mail at **samwright50@yahoo.com**.