

# Law Review 12102

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## Coast Guard Reservist Mobilized Soon After Hired for New Job

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1.1.1.7—USERRA Applies to State and Local Governments

1.1.3.2—USERRA Applies to Regular Military Service

1.2—USERRA Prohibits Discrimination

1.3.1.1—Left Job for Service and Gave Prior Notice

1.4—USERRA Enforcement

**Q: I am a petty officer in the Coast Guard Reserve. I have been seeking employment, and I was notified on October 1 that I have been selected to be a police officer in my home town. The 22-week police academy starts on November 1. As soon as I received the notice, I called the personnel department of the police force and let them know that I accept the offer of employment and that I would report as directed on November 1, for the police academy start date.**

**On October 2, I went to the police department headquarters and signed paperwork making me a police officer, as of November 1. I was really looking forward to the police academy, but on October 5 the Coast Guard notified me that I am being called to active duty on October 29, probably for a year. I immediately notified the police department that I will be unable to report for the police academy on November 1 because I have been ordered to report to Coast Guard active duty three days earlier.**

**I thought that the police department would be supportive, but just the opposite is the case. The Chief of Police told me that I am not an employee of the city because my start date has not arrived, but he also pressed me to sign a “resignation” letter. If I am not an employee, how can I resign from employment? Should I sign the letter that has been prepared for me? What effect would my signature have? Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) give me rights in this sort of situation? What should I do?**

**A:** First, I would advise you not to sign a “resignation” letter, but signing such a letter would not deprive you of the right to reemployment upon returning from service. You cannot waive the right to reemployment until you have the right to reemployment, and you do not have the right to reemployment until you return from the period of service and make a timely application for reemployment. Your “resignation” is of no legal effect.[\[1\]](#)

As I explained in Law Review 1281 and other articles, you have the right to reemployment under USERRA, after a period of uniformed service, if you meet the following conditions:

1. You must have left a position of civilian employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
2. You must have given the employer prior oral or written notice.
3. You must not have exceeded the cumulative five-year limit with respect to the employer relationship for which you seek reemployment.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

If you leave active duty in the fall of 2013, as you expect to do, you should make a timely application for reemployment with the police department. At that point, if you meet the five eligibility conditions and the police department denies you reemployment, I can recommend an attorney to you, to sue the city in federal district court.

As I explained in Law Review 36 (December 2001), I would argue that you entered into an employee-employer relationship with the police department when the department unambiguously offered you employment, with a start date, and when you communicated to the department your unambiguous acceptance of the offer. Although you had not yet reported to duty with the police department, because the police academy start date had not yet arrived when you were called to the colors by the Coast Guard, you were an employee, and you left your employment relationship with the police department to report to Coast Guard duty. I would argue that if you meet the other eligibility criteria for reemployment in the fall of 2013, after you complete the call-up, you will have the right to reemployment with the police department.

I acknowledge that there is not a lot of case law on this very specific topic. I have found only one published court decision, and that decision is unfavorable. *See Quick v. Frontier Airlines, Inc.*, 544 F. Supp. 2d 1197, 1207-08 (D. Colo. 2008). Mr. Quick was accepted into the airline's "hiring pool for future hiring" and while in that status he entered active duty and thus was not hired by the airline. When he was released from active duty, he contended that he *would have been hired* by the airline, but for having been on active duty at the time, and that thus he was entitled to reemployment upon his application, after release from active duty. The United States District Court for the District of Colorado rejected this argument.

Quick sought to appeal to the United States Court of Appeals for the Tenth Circuit<sup>[2]</sup> but was precluded from doing so by the bankruptcy of Frontier Airlines. I have done a computer search of the *Quick* decision. I found several later published court decisions that have cited *Quick*, but none of those decisions deal with this specific point. You can argue that *Quick* is distinguishable. In your case, you had a specific start date that was only a month away, rather than merely being in a "hiring pool" for likely future hiring. Alternatively, you can argue that *Quick* was wrongly decided. A federal district court decision is entitled to some weight but is certainly not controlling.

When you return from active duty in the fall of 2013, you should *renew your application for employment* while simultaneously applying for reemployment. If the court follows *Quick* and decides that you do not have the right to reemployment under section 4312 of USERRA<sup>[3]</sup> the court could nonetheless rule in your favor under section 4311<sup>[4]</sup> by holding that the city violated USERRA by *withdrawing the offer of initial employment* when you notified the city (on October 5, 2012) that you were being called to active duty effective October 29, 2012.

I invite your attention to *McLain v. City of Somerville*, 424 F. Supp. 2d 329 (D. Mass. 2006). In May 1999, Thomas McLain passed a Massachusetts civil service examination to become a police officer. He enlisted in the United States Army and entered active duty on January 5, 2000.<sup>[5]</sup> His initial active duty period was scheduled to last for two years, or until January 4, 2002.

As it is required to do to initiate the civil service system hiring process, on October 12, 2000, Somerville notified the Massachusetts Human Resources Division ("HRD") that it was seeking to hire five police officers. On January 11, 2001, HRD approved Somerville's request for new officers and sent a certified "eligible list" of persons the City could lawfully consider to fill the five vacancies. McLain's name was fourth on the list of eligible candidates. He was notified by mail that he was being considered for appointment as a Somerville police patrol officer, and that he was required to indicate his interest in such an appointment. McLain, in turn, properly made known his interest in the appointment.

As of January 11, 2001, Somerville was authorized to appoint five new police officers, but did not appoint any new officers at that time. Over the next few months, HRD granted several requests by Somerville to increase the number of authorized appointments, but Somerville made no new appointments. Thus, by August 31, 2001, Somerville had eleven vacancies to fill. On August 30, 2001, HRD informed Somerville that any selections it intended to make from the existing list had to be made by August 31, 2001.

At some point in August, 2001, Somerville Assistant Personnel Director Kathleen DiCaccio ("DiCaccio") spoke to

McLain by telephone and informed him that he had been selected as a patrol officer, subject to his ability to attend the required police academy training session set to begin on October 1, 2001. McLain told DiCaccio that he would still be on active duty on that date, and that, although he expected he could get early release<sup>[6]</sup>, he would not be available until at least several weeks after the October 1 start date of the training session. McLain was thereafter informed that Somerville would not hire him because he would not be released from the Army in time to attend the October 1 session of the police academy. Somerville considered McLain an "outstanding candidate" and would have hired him if he had been available to start his training at the police academy on October 1, 2001. On November 1, 2001, McLain sent a letter to DiCaccio thanking her for her help with the application process and expressing his continued desire to become a Somerville police officer in the future.

Massachusetts law requires new police hires to attend training -- usually at a twenty-week session at a police academy -- before they may become sworn police officers. With no input from Somerville, the Massachusetts Criminal Justice Training Council ("MJTC") scheduled the eight Somerville hires who had not previously completed police training to attend the October 1 police academy, thus beginning their employment as Somerville police officers. MJTC conducted a number of police academies shortly after McLain's return to Massachusetts, including two starting December 17, 2001; one starting January 14, 2002; and another starting January 28, 2002.

As of May 1, 2005, Somerville had done no further hiring of police officers since the hiring at issue in this case. All of the police officers who started work on October 1, 2001 were still employed by the Somerville Police Department as of the commencement of this case.

McLain's basic argument was that Somerville violated his rights under USERRA when it failed to hire him because his military service prevented him from being available on the day Somerville wanted him to start work. The parties did not dispute that McLain would have been hired had he been available for the training academy on October 1, 2001, and that he was not available on that date because of his active service in the Army. The sole question was whether USERRA prevents discrimination in initial hiring on the basis of unavailability due to active service in the military.

McLain sued the City of Somerville, contending that the city violated section 4311 of USERRA when it withdrew the offer to employ him. The court held: "By USERRA's plain terms, then, Somerville's failure to hire McLain violated the statute: Somerville, a covered employer, denied initial employment to McLain, a member of the Army, because of McLain's obligation to perform service in that uniformed service in the fall of 2001."

The City of Somerville did not appeal to the 1<sup>st</sup> Circuit.<sup>[7]</sup> I did an electronic search on *McLain*. I found several later cases that have cited it, but none on this specific point of law. Applying the *McLain* precedent to your situation, I would argue that the city violated section 4311 of USERRA when it withdrew its offer of initial employment *because of* your call to the colors in the Coast Guard.

In summary, you should apply for reemployment and renew your application for initial employment when you return from active duty in the fall of 2013. If the city refuses to bring you on board and send you to the next police academy class, you can file suit against the city in the appropriate federal district court.<sup>[8]</sup> There are two alternative legal theories available to you. You can win under either theory, or perhaps under both.

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[1] Please see Law Review 63 (January 2003) and Law Review 0838 (August 2008). I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 802 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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.

[\[2\]](#) The 10<sup>th</sup> Circuit is the federal appellate court that sits in Denver and hears appeals from district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

[\[3\]](#) 38 U.S.C. 4312.

[\[4\]](#) 38 U.S.C. 4311.

[\[5\]](#) It does not matter that McLain joined the Regular Army, not the Army Reserve or the Army National Guard. USERRA applies to those who serve in the Active Components as well as the Reserve Components of the armed forces.

[\[6\]](#) The possibility of early release for McLain was likely obviated by the terrorist attacks of September 11, 2001.

[\[7\]](#) The 1<sup>st</sup> Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[\[8\]](#) Venue is proper in the United States District Court for the District where the city exercises authority. 38 U.S.C. 4323(c)(1).