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May We Forbid Current Employees Permission to Join Reserves?

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Q: I am the city attorney here in the Midwest. I came upon your Law Review columns about the Uniformed Services Employment and Reemployment Rights Act (USERRA) while doing legal research on the Internet. The city has a current employee, a police officer, who is considering applying to join the Army Reserve. The city has a policy that forbids outside employment that interferes with city duties. If this police officer were to join the Army Reserve, he would be required to perform weekend drills and active duty for training (and maybe active duty in a mobilization) that would interfere with his city duties. Our police chief has threatened to fire this officer if he joins the Army Reserve. Does USERRA grant rights to a current employee who is not a Reservist when hired but applies to become one after becoming an employee?

A: Yes. I invite your attention to section 4311(a) of USERRA, which provides: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." [38 U.S.C. 4311(a)(emphasis supplied)].

The pertinent legislative history is as follows: "Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment [see Beattie v. Trump Shuttle, Inc., 758 F. Supp. 30 (D.D.C. 1991)], current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units [see Boyle v. Burke, 925 F.2d 497 (1st Cir. 1991)], or employees who have a military obligation in the future, such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. [See Trulson v. Trane Co., 738 F.2d 770, 775 (7th Cir. 1984).] The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced." House Report No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2456.

I also invite your attention to Kolkhorst v. Tilghman, 897 F.2d 1282 (4th Cir. 1990), cert. denied, 502 U.S. 1029 (1992). The city of Baltimore had a rule limiting to 100 the number of police officers who could be members of Reserve Components at any one time. The city enforced the rule by means of a permission requirement. Police officers requesting permission to join a Reserve Component were made to wait many years, until some of the 100 police officers retired from the police force, retired from a Reserve Component, quit, died, or whatever. When finally given permission to join

a Reserve Component, the police officer often was unable to join, because of military rules about maximum age and maximum years away from active duty.

The court held that the city of Baltimore's quota rule violated the re-employment statute. The court awarded damages based on what these police officers would have earned from the Reserve Component (including retirement benefits) but for the city's unlawful rule. This case ended up costing the city of Baltimore many millions of dollars, so my advice to your city is "don't go there."

I also invite your attention to Article VI, clause 2 of the U.S. Constitution, commonly called the "Supremacy Clause," and to 38 U.S.C. 4302(b), which provides that USERRA overrides conflicting state laws, local ordinances, collective bargaining agreements, employer policies, etc. Your city's "no outside employment" rule is inconsistent with the Supremacy Clause. See Peel v. Florida Department of Transportation, 600 F.2d 1070, 1073-74 (5th Cir. 1979); Cronin v. Police Department of the City of New York, 675 F. Supp. 847, 853 (S.D.N.Y. 1987); Fitz v. Board of Education of the Port Huron Area Schools, 662 F. Supp. 1011, 1014-15 (E.D. Mich. 1985), affirmed, 802 F.2d 457 (6th Cir. 1986); Mazak v. Florida Department of Administration, 113 L.R.R.M. 3217 (N.D. Fla. 1983). ROA

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