

## LAW REVIEW 130

### Right to Prompt Reinstatement Despite Temporary Disability

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**Q: I was called to active duty and deployed to Iraq. I was injured when an improvised explosive device was detonated near the vehicle in which I was traveling. One of my colleagues was killed, but fortunately my injuries were not especially serious. I did require surgery on my knee and follow-up physical rehabilitation. I was released from active duty in March and applied for reemployment at the large manufacturing plant, where I had worked on the assembly line. The employer's personnel office referred me to the company doctor, and I gave him a copy of a "physical profile" signed by an Army doctor on 30 December 2003. The company doctor did not examine me in any detail, but he did read the Army form. He said that he would not sign off on my returning to work because he was afraid that my condition would cause the company's workers' compensation insurance premiums to rise. The personnel office relied on the company doctor's recommendation and has refused to reinstate me in my job. Help!**

**A:** In Law Review 121 (April 2004), I discussed in detail USERRA's provisions for returning disabled veterans, but in this case I do not think that the disability provision even comes into play. I invite your attention to the following paragraph from the *Veterans' Reemployment Rights Handbook*: "Before the disability provision can come into play, it must be established or agreed that the veteran is not qualified to perform the duties of the position to which he would be entitled but for the disability or handicap. In relation to that position or any position claimed under the disability provision, the sole qualification is his actual ability to perform the duties of the job according to ordinarily applicable standards of performance without unusual risk to the health and safety of himself and others. *The possible effect of his disability or impairment on the cost of workmen's compensation insurance would not be a legitimate disqualifying factor.*" 1988 VRR Handbook, page 16-1 (emphasis supplied).

In this case, a big part of the problem was that the company doctor could not decipher the Army doctor's handwriting and the confusing Army form (DA Form 3349 of May 1986). The termination date on the physical limitations was intended to be 30 March 2004, but the company doctor thought that the termination date was 30 May 2004. (In fairness to the company, the Army doctor's "R" does look something like a "Y.") More importantly, the Army form has a short list of precluded physical activities and a much longer list of activities that are *not* precluded. The company doctor misunderstood this form.

In any case, I am informed that you are now back at work, with back pay for the delayed reinstatement, thanks to the efforts of the National Committee for Employer Support of the Guard and Reserve (ESGR), a Department of Defense organization. Its mission is: "To gain and maintain support from all public and private employers for the

men and women of the National Guard and Reserve as defined by demonstrated employer commitment to employee military service.” You can reach ESGR toll-free at 1-800-336-4590. I also invite your attention to the ESGR Web site, [www.esgr.com](http://www.esgr.com) [<http://www.esgr.com/>](http://www.esgr.com/).

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