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Does Medical Hold Time Count toward the Individual's Five Year Limit under USERRA?

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1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Coast Guard Reserve officer. I am on active duty, and my duties involve the order-writing and personnel administration for other Coast Guard Reservists. I read and utilize your “Law Review” articles.^[1] I have especially read and reread your Law Review 201, about the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

We have a Coast Guard Reserve petty officer—let's call him “Joe Smith.” Petty Officer Smith was called to involuntary active duty in 2007, in accordance with section 12301(a) of title 10 of the United States Code (10 U.S.C. 12301(a)). He completed his involuntary active duty in November 2008. Instead of leaving active duty, he voluntarily signed on to remain on active duty on ADOS (Active Duty for Operational Support) orders, for an additional four years, or through November 2012.

Near the end of the four-year ADOS orders, he suffered a serious injury in the line of duty. In accordance with 10 U.S.C. 12301(h), we (the Coast Guard) offered him a choice. He could remain on active duty to receive military medical care for his injury, until he is sufficiently recovered to be “fit for duty” and then be released from active duty. Alternatively, he could leave active duty and receive a “Notice of Eligibility” (NOE) to receive military medical care for the injury although he would no longer be on active duty.

Petty Officer Smith chose to remain on active duty and he is receiving care and recovering from the injury, but it appears that he will need to continue the treatments for many more months, and now he is concerned about the five-year limit under USERRA.

Smith went to work for the XYZ Company in 2001 and left his XYZ job in 2007 for the involuntary call-up. We have determined that none of his Coast Guard Reserve duty between 2001 and 2007 counts toward the five-year limit. Similarly, his year of involuntary duty, from 2007 to 2008, does not count toward his limit. It appears that his four years of voluntary ADOS duty, from November 2008 to November 2012, count toward his five-year limit. The question is: Does his active duty for medical treatment under section 12301(h) count toward his five-year limit? If it does, Petty Officer Smith will need to leave active duty before November 2013 in order to preserve his right to reemployment at XYZ Company.

A: I commend you for looking out for individual reservists in this way. USERRA's five-year limit is set forth in section 4312(c) of the law, as follows:

“(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is —

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.”

38 U.S.C. 4312(c).

Petty Officer Smith’s current duty under 10 U.S.C. 12301(h) is voluntary, and section 12301(h) is not mentioned in any of the subsections of section 4312(c) of USERRA. I think that we must assume that this current period of duty counts toward Smith’s five-year limit with respect to the XYZ Company as his employer. He needs to leave active duty before the five-year alarm clock goes off in November of 2013.

[1] We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 855 articles about the laws that are most pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated the column in 1997, and we add new articles each week. We added 122 new articles in 2012.