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Wounded Warriors and the Americans with Disabilities Act

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Q: I have read with interest your Law Review 854 (November 2008), concerning the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to the “wounded warrior” scenario. My situation is much like that of the Soldier you mentioned in that article, with one significant difference. Unlike that Soldier, I did not leave a civilian job to report to boot camp. Indeed, I have never had a civilian job.

In November 2008, during my senior year in high school, I visited an Army recruiter and enlisted, with parental permission, in the Delayed Entry Program. I graduated from high school in May 2009 and reported to boot camp days later. In July 2012, I was on active duty and serving in Afghanistan when I suffered catastrophic wounds in combat—I lost my left arm and left leg. I am still on active duty, assigned to a Wounded Warrior Battalion, while I am undergoing medical treatment and rehabilitation, including installation of a prosthetic arm and prosthetic leg and learning to use them. I am also being processed for a disability retirement from the Army. I expect to leave active duty sometime later this year.

When I leave active duty, will I have rights under USERRA? What about other federal laws?

A: Because you do not have reemployment rights with a specific civilian employer, USERRA is not particularly pertinent to your situation, but you have very valuable rights under the Americans with Disabilities Act (ADA).

President George H.W. Bush signed the ADA into law on July 26, 1990. On September 28, 2008, President George W. Bush signed into law the Americans with Disabilities Act Amendments Act (ADAAA), which expanded the ADA’s protections in several important ways. The ADA, as amended, is codified in title 42 of the United States Code, at section 12101 and following (42 U.S.C. 12101 *et seq.*). Most pertinent for the present discussion is Title I of the ADA, dealing with employment, and codified at 42 U.S.C. 12111-12117.

The ADA applies to state and local governments and private sector employers with 15 or more employees. Under section 501 of the Rehabilitation Act, the same ADA standards of non-discrimination and reasonable accommodations apply to federal Executive Branch agencies, including the United States Postal Service.

Title I of the ADA prohibits an employer from treating an employee or applicant for employment unfavorably because the employee has a disability, or a history or having a disability, or because the employer regards the individual as having a disability. Under the ADA, the origin of the disability is irrelevant. It may be a birth defect or may be the result of a workplace accident, a vehicular accident, a combat wound, etc.

The ADA provides that absent undue hardship to the employer (“significant difficulty or expense”), applicants and employees with disabilities are entitled to reasonable accommodations to apply for jobs, to perform their jobs, and to enjoy equal benefits and privileges of employment (e.g., access to all parts of the employer’s facility available to all employees and access to employer-sponsored training and social events).

As applied to veterans, the ADA makes it unlawful for an employer to refuse to hire a veteran because he or she has Post-Traumatic Stress Disorder (PTSD), or because he or she was previously diagnosed with PTSD, or because the employer assumes (perhaps incorrectly) that the veteran has PTSD.

An independent federal agency called the Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the ADA and other federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 (which outlaws employment discrimination based on race, color, sex, religion, or national origin). You must make a written complaint to the EEOC within 180 days after the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination law also covers the charge.

Under section 206 of the Servicemembers Civil Relief Act (SCRA), the 180-day or 300-day deadline (or any statute of limitations for filing a suit or complaint in any federal or state court or administrative agency) is tolled during a period when you are on active duty. 50 U.S.C. App. 526(a). For example, if you go on active duty for a year 30 days after your claim accrues, you still have 150 days (or perhaps 270 days) to file the complaint after you leave active duty, because the deadline is not running during your active duty service.

After you file a written charge, the EEOC will send you and the employer a copy of the charge and may ask for responses and supporting information. The EEOC investigates the charge to determine if there is “reasonable cause” to believe that discrimination has occurred. In some cases, the EEOC will file a court action on your behalf. More commonly, the EEOC will issue you a “right to sue letter.” If you receive such a letter, you may then bring suit in federal district court within 90 days after receiving the notice.

The enforcement mechanism described above is for ADA complaints. A different mechanism (not involving the EEOC) applies to complaints of employer violations of USERRA. You may have multiple potential causes of action arising out of the same unfavorable personnel action (firing, refusal to hire, denial of promotion, etc.). You may need legal advice to sort out the various causes of action that may apply and to initiate the appropriate enforcement mechanism within the time permitted by law. The important thing to remember is “don’t sleep on your rights.” If you sleep on your rights, you may find that you have no enforceable rights when you wake up.