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DOJ Sues Cook County for Violating USERRA
Pension Rights of Army Reserve Nurse

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Latoya A. Hayward is a registered nurse and a Captain in the Army Reserve.[1] She was called to active duty for two years, from July 2009 to July 2011. When she was called to the colors, she left her job at the John H. Stoger, Jr. Hospital, which is owned and operated by Cook County.[2] She was entitled to reemployment after she left active duty in July 2011 because she met the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3]

As I explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment.
d. Must have been released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA, 38 U.S.C. 4304.
e. Must have made a timely application for reemployment with the pre-service employer after release from the period of service.

Ms. Hayward clearly met these USERRA requirements. She left her civilian job for the purpose of performing uniformed service and gave the employer prior notice. She served honorably and did not receive a disqualifying bad discharge. She has not exceeded the five-year limit with respect to her employer relationship with Cook

[1] Unfortunately, she is not a member of ROA, although she is certainly eligible. We are trying to sign her up. Anybody know her?
[2] Cook County is the largest county in Illinois and includes Chicago. Hayward is a county employee.
[3] As is explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. USERRA is codified in sections 4301-4335 of title 38 of the United States Code (38 U.S.C. 4301-35). I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 903 articles about USERRA and other laws that are especially 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. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 81 so far in 2013.

County. At least part of her two-year active duty period was involuntary and does not count toward her five-year limit.[4]

Because she met the USERRA eligibility criteria, she was entitled to be treated *as if she had been continuously employed in the civilian job* for purposes of computing her civilian pension benefits, under section 4318 of USERRA, which provides as follows:

"(a)
(1)
(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.
(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
(2)
(A)A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.
(b)
(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—
(A)by the plan in such manner as the sponsor maintaining the plan shall provide; or
(B)if the sponsor does not provide—
(i)to the last employer employing the person before the period served by the person in the uniformed services, or
(ii)if such last employer is no longer functional, to the plan.
(2)A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. *No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B).* Any payment to the plan described in this paragraph shall be

[4] Please see Law Review 201 (October 2005) for a detailed discussion of what counts and what does not count toward exhausting her five-year limit.

made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.
(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—
(A)at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
(B)in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).
(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan."

38 U.S.C. 4318 (emphasis supplied).

Under section 4312(e)(1)(D) of USERRA [38 U.S.C. 4312(e)(1)(D)], Ms. Hayward had 90 days to apply for reemployment after she was released from active duty in July 2011 because her period of service was more than 180 days. Because she was returning from two years of very intense service treating the wounded warriors of Iraq and Afghanistan, she waited most of the 90 permissible days before applying for reemployment, but her application was timely under section 4312(e)(1)(D).

Ms. Hayward returned to work for Cook County at the Stoger Hospital after her military service, but Cook County violated her USERRA pension rights in two important ways. The Cook County pension plan for nurses is contributory—the nurses contribute a portion of their salary and the county matches it. Under section 4318(b)(2) of USERRA [38 U.S.C. 4318(b)(2)], Ms. Hayward was entitled to *make up her missed employee contributions* after she returned to work and to obtain the employer matches, as if she had been continuously employed.

Cook County permitted Ms. Hayward to make up the employee contributions that she missed during the two years that she was on active duty but refused to let her make up the contributions that she missed during the period after she left active duty and before she applied for reemployment. This refusal violated USERRA. As I explained in Law Review 60 (December 2002), the returning veteran who meets the USERRA eligibility criteria is entitled to be treated for seniority and pension purposes as if he or she had been continuously employed in the civilian job *during the entire period of the military-related absence from work,* and this includes the period of up to 90 days while the individual is off active duty and waiting to apply for reemployment.

Cook County permitted Ms. Hayward to make up the employee pension contributions that she missed during her two years of active duty, but the county charged her interest on these make-up contributions. Charging her interest violated section 4318(b)(2), which provides: *"No such* [make-up] *payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B)."* 38 U.S.C. 4318(b)(2) (emphasis supplied).

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, the Secretary published proposed USERRA regulations in the *Federal Register.* After considering the comments received and making a few adjustments, the Secretary published the final USERRA regulations in December 2005. The regulations are published in the Code of Federal Regulations (C.F.R.) in Title 20, Part 1002.

One particular section of the Secretary's USERRA Regulations makes clear that it is unlawful for the employer or the pension plan to make the returning veteran pay interest on the make-up pension contributions after returning to work. The pertinent section is as follows:

"**Does the employee pay interest when he or she makes up missed contributions or elective deferrals?**

No. The employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service."

20 C.F.R. 1002.263 (bold question in original).

After Cook County violated Ms. Hayward's USERRA pension rights, she complained in writing to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), in accordance with section 4322 of USERRA, 38 U.S.C. 4322. As required by that section, DOL-VETS investigated her complaint and found it to have merit. DOL-VETS advised Ms. Hayward and Cook County of its findings, but the county refused to comply with USERRA. Ms. Hayward requested DOL-VETS to refer her case file to the United States Department of Justice (DOJ), and the case file was referred, in accordance with section 4323(a), 38 U.S.C. 4323(a).

DOJ agreed with DOL-VETS that Ms. Hayward's claim was meritorious, and DOJ filed suit on Ms. Hayward's behalf on April 17, 2013, in the United States District Court for the Northern District of Illinois. In announcing the filing of the lawsuit, the Honorable Gary Shapiro[5] said: "Members of the Army Reserve sacrifice time away from their jobs to serve their country. Federal law ensures that they are not discriminated against after they have returned and their employment rights are protected."

In several of my published Law Review articles, I have been critical of DOL-VETS for a lack of vigor in enforcing USERRA. I am pleased to report that in this case at least DOL-VETS did not simply accept the employer's factual and legal assertions at face value and close the case as "without merit." I am also pleased to report that DOL-VETS and DOJ were expeditious in investigating and reviewing this case and filing suit. Ms. Hayward returned from active duty in July 2011 and apparently applied for reemployment in October 2011. DOJ filed suit just 18 months later, in April 2013.

Like many public employee pension plans, the Cook County and Illinois plans are overpromised and underfunded, but it is unconscionable for public employee pension plan administrators to contemplate shortchanging the brave young men and women who have interrupted their public employee careers for military service as a way of addressing these fiscal problems. If there is not enough money available to pay all the promised benefits, it may be necessary to impose a "haircut" on *all* employees and retirees. *Before* any such proportional cuts in promised pension benefits are made, all employees who interrupted their careers for military service must first receive proper pension credit for their military service time, as mandated by USERRA. The prospect of "haircuts" in promised pension benefits makes it all the more important that veterans receive mandated credit.

We will keep the readers informed of developments in this important case.

[5] Mr. Shapiro is the United States Attorney for the Northern District of Illinois. Each of the 93 United States Attorneys is appointed by the President with Senate confirmation.