

## LAW REVIEW 13111

August 2013

### How to Compute one Year for Purposes of Section 4316(c) of USERRA

#### 1.2—USERRA forbids discrimination

#### 1.3.2.12—Special protection against discharge, except for cause

*Key v. City of Princeton, Kentucky, 2010 U.S. Dist. LEXIS 95957 (W.D. Ky. Sept. 14, 2010).*<sup>1</sup>

Jason Key was employed as a police officer for the City of Princeton from 1995 until February 2008, when he was called to active duty as a member of the 223<sup>rd</sup> Military Police Company of the Kentucky Army National Guard. Key gave prior notice to his employer that he would be away from work for active military service for approximately one year, and he deployed to Iraq with his unit. He served honorably and was released from active duty in February 2009. He made a timely application for reemployment with the City, and he returned to work on March 10, 2009. On March 10, 2010, the City fired him, allegedly for insubordination.

Key clearly met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He gave the employer prior notice. He did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, and since this was an involuntary call-up it did not count toward his five-year limit in any case. *See* 38 U.S.C. 4312(c). He was released without a disqualifying bad discharge listed in 38 U.S.C. 4304. After he was released from the period of service, he applied for reemployment with his pre-service employer well within the 90 days permitted to him under 38 U.S.C. 4312(e)(1)(D).

Because Key met the USERRA eligibility criteria, he was entitled to reemployment, and he was also entitled to one year of special protection against discharge, except for cause, under section 4316(c) of USERRA, which provides as follows:

“(c) A person who is reemployed by an employer under this chapter *shall not be discharged* from such employment, *except for cause*—

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<sup>1</sup> This is a decision by Judge Thomas B. Russell, the Chief Judge of the United States District Court for the Western District of Kentucky. The defendant (City of Princeton, Kentucky) filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The City claimed that, even accepting as true all of the factual allegations made by plaintiff Jason Key, there was no relief to which Key was entitled, and therefore the case should be dismissed. Judge Russell denied this motion. There is no subsequent history of this case. The most likely inference is that the parties reached a settlement of their differences.

(1) *within one year after the date of such reemployment*, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days."

38 U.S.C. 4316(c) (emphasis supplied).

Key was clearly entitled to one year of special protection against discharge, except for cause. The big question is when did that one year start running, and when did it expire?

The City argued that the one year of special protection started running on March 9, 2009, when Key returned to work; therefore, the City was not required to prove cause for firing Key on March 9, 2010, one year later. Key argued, and Judge Russell agreed, that the one year of special protection started running on March 10, 2009, the day after Key returned to work, so the firing on March 9, 2010 was within one year after his reemployment.

If the City had waited one or two more days before firing Key, he could have argued that his one year of special protection had not expired because it had not started running. Key could argue that the City did not *properly reemploy him in good faith*—that they were looking for an excuse to avoid their USERRA responsibilities. The one-year period of special protection begins only upon the *proper and complete reinstatement* of the returning veteran. *See O'Mara v. Petersen Sand & Gravel Co., Inc.*, 498 F.2d 896, 898 (7<sup>th</sup> Cir. 1974).

Even after the period of special protection has expired, Key can still challenge the lawfulness of the firing under section 4311 of USERRA, which provides as follows:

**(a)** 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.

**(b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person

**(1)** has taken an action to enforce a protection afforded any person under this chapter,  
**(2)** has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

**(3)** has assisted or otherwise participated in an investigation under this chapter, or  
**(4)** has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

**(c)** An employer shall be considered to have engaged in actions prohibited—

**(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a *motivating factor*

in the employer's action, unless the employer can *prove that the action would have been taken* in the absence of such membership, application for membership, service, application for service, or obligation for service; or

**(2)** under subsection (b), if the person's

**(A)** action to enforce a protection afforded any person under this chapter,

**(B)** testimony or making of a statement in or in connection with any proceeding under this chapter,

**(C)** assistance or other participation in an investigation under this chapter, or

**(D)** exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

**(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title."

38 U.S.C. 4311 (emphasis supplied).

In challenging his firing under section 4311, Key would not be required to prove that he was fired *solely* because of his Army National Guard service and obligations. It is sufficient for him to prove that his service and obligations were a *motivating factor* in the employer's decision to terminate his employment. If he proves that, the *burden of proof* shifts to the employer to *prove* that they would have fired him anyway, for a lawful reason unrelated to his service. But since Key was fired before the special protection period expired, he does not need to prove motivating factor.