

Applying for Reemployment Is Not Applying for Employment

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1.3.1.3—Timely application for reemployment

1.8—Relationship between USERRA and other laws/policies

Q: In late 2011, I applied for employment with a very large national corporation, and I was hired in January 2012. I am a Staff Sergeant in the Army Reserve, and I was called to active duty and deployed to Southwest Asia from July 2012 until late August 2013. I gave the company written notice when I was called to active duty, and I applied for reemployment the day after I left active duty, on August 26, 2013. The company's personnel office has told me that I must go through the exact same application process (with interviews, references, a physical exam, etc.) that I went through in December 2011, when I was hired by this company.

This is a very large company with thousands of employees, but only a handful of the employees are members of the National Guard or Reserve. This company seems clueless about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I found your “Law Review” articles¹ by doing an Internet search. Do you think that the company is violating my USERRA rights by treating me like an applicant for initial hiring?

A: Clearly, yes. See *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008), cert. denied, 556 U.S. 1165 (2009) (*Petty I*). See also *Petty v. Metropolitan Government of Nashville*, 687 F.3d 710 (6th Cir. 2012) (*Petty II*).

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

- a. You must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing service in the uniformed services.
- b. You must have given the employer prior oral or written notice.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which you seek reemployment.
- d. You must have been released from the period of service without having received a disqualifying bad discharge.
- e. You must have made a timely application for reemployment after release from the period of service.

It seems clear that you meet these five conditions. The statute (USERRA) sets forth the five conditions that you must meet, and it is unlawful for the employer to impose additional conditions (new interviews, a new physical examination, etc.).

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 939 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. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 117 so far in 2013.

This is a good case for the invocation of the legal doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). By setting forth the five conditions that the returning veteran must meet to have the right to reemployment, Congress clearly precluded the creation of any additional conditions.

The classic example of *expressio unius est exclusio alterius* comes in the early Supreme Court case, *Marbury v. Madison*, 5 U.S. 137 (1803). Article III, section 2, clause 2 of the Constitution establishes the *original* (as opposed to appellate) jurisdiction of the Supreme Court-cases affecting ambassadors and other public ministers and disputes between states. The statute at issue in *Marbury* expanded the original jurisdiction of the Supreme Court to include cases in which a *writ of mandamus* is sought against a federal official. The Supreme Court held that since the Constitution expressly states the classes of cases for which the Supreme Court has original jurisdiction, a federal statute that adds additional classes of cases to the original jurisdiction of the Supreme Court is unconstitutional.