

LAW REVIEW 14035
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Is my Case Governed by VEVRAA or USERRA?

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Q: I recently completed five years of active duty in the Army and I am looking for a civilian job. In doing research on the Internet, I found your “Law Review” articles about the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and other laws that are especially pertinent to those who are serving or have served in the armed forces.¹ Those articles are very helpful, but perhaps you can advise me about my specific situation.

I graduated from high school in 1999 and found a job working for a large defense contractor (let’s call it Daddy Warbucks International or DWI) in February 2002. I worked there for seven years and enlisted in the Army (the Regular Army, not the Army Reserve or Army National Guard) in late 2008. I served on active duty for exactly five years, from March 1, 2009 to February 28, 2014.

In February 2009, as I was preparing to report to boot camp, I told my supervisor and others at DWI that I was joining the Army. The supervisor took me and several of my colleagues to lunch on my last day at work and honored me for my seven years at DWI and my decision to join the Army. At the time, I had no thought of ever returning to the company, and I intended to make the Army my career. I had no idea that a federal law gave me the right to reemployment, and I said nothing to the supervisor about any plans to return to DWI after my Army service.

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,026 articles about military-relevant laws, 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 169 new articles in 2013 and another six last week.

During my five years on active duty, I served a year “boots on ground” in Iraq, and later almost a year in Afghanistan. My assignment to Afghanistan was cut short when I was wounded in action. I had two surgeries and a lot of rehabilitation. I have largely recovered from my wounds, but I was separated from the Army with a disability rating of 40%.

I returned to my home town just days ago. I visited the personnel office at DWI and inquired about a job. They told me “we’re not hiring.” I also learned that the specific contract that I was working on during the seven years I worked for DWI came to an end in 2011. Does that mean that I don’t have the right to return to work at DWI?

Are my rights governed by VEVRAA or by USERRA? How can a law whose title refers to the Vietnam War apply to me? The Vietnam War was my father’s war.

A: Both VEVRAA and USERRA are applicable to your situation, and you should assert your rights under both statutes. I agree with you that the title of VEVRAA is misleading—almost all Vietnam-era veterans have now reached retirement age and are no longer seeking employment. I prefer to refer to this law as section 4212 of title 38 of the United States Code (U.S.C.). That section provides as follows:

§ 4212. Veterans' employment emphasis under Federal contracts

(a)

(1) Any contract in the amount of \$ 100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of \$ 100,000 or more entered into by a prime contractor in carrying out any such contract.

(2) In addition to requiring affirmative action to employ such qualified covered veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the Secretary of Labor shall prescribe regulations requiring that--

(A) each such contractor for each such contract shall immediately list all of its employment openings with the appropriate employment service delivery system (as defined in section 4101(7) of this title, and may also list such openings with one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery points, or America's Job Bank (or any additional or subsequent national electronic job bank established by the Department of Labor), except that the contractor may exclude openings for executive and senior management positions and positions which are to be filled from within the contractor's organization and positions lasting three days or less;

(B) each such employment service delivery system shall give such qualified covered veterans priority in referral to such employment openings; and

(C) each such employment service delivery system shall provide a list of such employment openings to States, political subdivisions of States, or any private entities or organizations under contract to carry out employment, training, and placement services under chapter 41 of this

title.

(3) In this section:

(A) The term "covered veteran" means any of the following veterans:

(i) Disabled veterans.

(ii) Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.

(iii) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985 (61 Fed. Reg. 1209).

(iv) Recently separated veterans.

(B) The term "qualified", with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.

(b) If any veteran covered by the first sentence of subsection (a) believes any contractor of the United States has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.

(c) The Secretary of Labor shall include as part of the annual report required by section 4107(c) of this title the number of complaints filed pursuant to subsection (b) of this section, the actions taken thereon and the resolutions thereof. Such report shall also include the number of contractors listing employment openings, the nature, types, and number of positions listed and the number of veterans receiving priority pursuant to subsection (a)(2)(B).

(d)

(1) Each contractor to whom subsection (a) applies shall, in accordance with regulations which the Secretary of Labor shall prescribe, report at least annually to the Secretary of Labor on--

(A) the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans;

(B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified covered veterans; and

(C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.

(2) The Secretary of Labor shall ensure that the administration of the reporting requirement under paragraph (1) is coordinated with respect to any requirement for the contractor to make any other report to the Secretary of Labor.

(3) The Secretary of Labor shall establish and maintain an Internet website on which the Secretary of Labor shall publicly disclose the information reported to the Secretary of Labor by contractors under paragraph (1).

The significant and permanent laws of the United States are codified in 49 titles (broad subject areas) of the United States Code. Title 38 deals with veterans' affairs and benefits. Both VEVRAA and USERRA are codified in title 38. You can find USERRA at 38 U.S.C. 4301-4335.

Because DWI is a federal contractor, it has an obligation, under section 4212, to "take affirmative action to employ and advance in employment qualified covered veterans." You qualify under section 4212 as a "covered veteran" in two ways. You are a recently separated veteran (within three years after your release from active duty), and you are a service-connected disabled veteran (more than 30% rating).

USERRA applies to private employers generally, as well as the Federal Government and state and local governments. The fact that DWI is a federal contractor is irrelevant for USERRA purposes. Federal contractors do not have additional obligations under USERRA, but neither are they exempted from the USERRA obligations that apply to employers generally.

As I explained in Law Review 1281 (August 2012) and other articles, you have the right to reemployment under USERRA if you meet five conditions:

- a. You held a civilian job (federal, state, local, or private sector) and left the job for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. You gave the employer prior oral or written notice.
- c. You have not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment.
- d. You were released from the period of service without a disqualifying bad discharge from the Army.
- e. After release from the period of service, you made a timely application for reemployment with the pre-service employer.

It seems clear that you meet these five conditions, with the possible exception of the final condition. It is not too late for you to make a proper and timely application for reemployment with DWI.

You told the supervisor in February 2009 that you were leaving your DWI job because you were enlisting in the Army. That is all you were required to do to meet the notice requirement. You were not required to mention USERRA or to express the intent to return to DWI after completing your active duty.

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

published in title 20 of the Code of Federal Regulations in Part 1002 (20 C.F.R. Part 1002). The pertinent section of the USERRA Regulations is as follows:

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

20 C.F.R. 1002.88 (bold question in original).

It seems clear that you have not exceeded the five-year limit, although you have used every day of the limit. You were released from active duty without a disqualifying bad discharge, like a bad conduct discharge, dishonorable discharge, or other-than-honorable discharge. *See* 38 U.S.C. 4304.

After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Because you left active duty on February 28, the deadline for you to apply for reemployment at DWI is May 29, 90 days later.

Simply inquiring about the availability of employment opportunities does not amount to applying for reemployment. There is no particular form of words that you need to use, but you do need to communicate that you are a former employee of DWI, that you left your DWI employment for military service, and that you have completed your military service and are seeking reemployment at DWI. The DOL USERRA Regulation provides as follows concerning the required content of an application for reemployment:

Is an application for reemployment required to be in any particular form?

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

20 C.F.R. 1002.118 (bold question in original).

In order to remove all doubt about the sufficiency of your application for reemployment, I suggest that you send a letter to the DWI personnel office, by certified mail. Here is a sample of what your letter might say:

Mr. George Washington
Personnel Director
Daddy Warbucks International
2929 Parrott
Waco, TX 76701

Dear Mr. Washington:

I worked for DWI for seven years, from February 2002 to February 2009, when I left to enlist in the United States Army. I gave the company prior notice that I was leaving for the purpose of military service. I served honorably and was released from active duty recently, without having exceeded the five-year limit. I am applying for reemployment. My application is timely, because I am making it well within the permissible 90-day period after the date of my release from active duty.

Because I meet the five eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA), I am entitled to prompt (generally, within two weeks after my application) reinstatement in the position that I would have attained if I had been continuously employed. I am ready and anxious to return to work at DWI. Please call me at (xxx) xxx-xxxx and advise me of the location, date, and time when I am to return to work.

Thank you for your prompt attention to this application for reemployment.

Q: I have a cousin who is a volunteer ombudsman for Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization that assists National Guard and Reserve personnel in issues with their civilian employers. She told me that USERRA only applies to individuals who leave their civilian jobs for National Guard and Reserve service, not Active Component service. What do you say about that?

A: Your cousin is wrong. USERRA and the predecessor reemployment statute have always applied to regular military service. I invite your attention to Law Review 0719, dated May 2007. I also invite your attention to Category 10.1 in our Law Review Subject Index. You will find a case note about each of the 17 Supreme Court cases under the reemployment statute. Only the last three cases² are about National Guard and Reserve service. The first 14 cases deal with regular military service, either as draftees or as volunteers.

² The last three Supreme Court cases are *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981); *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991); and *Staub v. Proctor Hospital*, 562 U.S. ____ (2011).

Q: Does it make a difference that the contract on which I had been working for most of my time at DWI came to an end in 2011, while I was on active duty?

A: Probably not.

A returning veteran who meets the five USERRA conditions is entitled to reinstatement “in the position of employment in which the person *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.” 38 U.S.C. 4313(a)(2)(A) (emphasis supplied). The position that the person *would have occupied* but for the uniformed service may be exactly the same position the person left, or a better position, an equivalent position, a worse position, or no position at all, depending on what *would have happened*.

In your case, the position that you *would have occupied* if you had remained continuously employed will not be the position that you left—the contract on which you had been working came to a close during your active duty period. In a defense contractor like DWI, contracts come and go, but employees do not ordinarily lose their jobs when a contract ends. Employees move within the company to new or ongoing contracts.

Let us say that we can identify ten employees with your approximate DWI seniority who were working for the company, in a position like your position, on the same contract as you, in February 2009, when you left DWI to join the Army. Six of them are still working for DWI today, on other contracts. This information shows that if you had not enlisted in the Army in 2009 you would more likely than not be still working for DWI, so you are entitled to reemployment in an active position now.

Q: How are my section 4212 (VEVRAA) rights enforced? How about my USERRA rights?

A: The Office of Federal Contract Compliance Programs (OFCCP), in DOL, is responsible for enforcing section 4212. If you believe that DWI has violated your section 4212 rights, you need to make a formal written complaint to OFCCP. That agency enforces section 4212 by withholding (or more often simply threatening to withhold) federal contracts. But if OFCCP refuses to act on your case, for whatever reason, you have no recourse, because section 4212 does not create a private right of action.

If you believe that DWI has violated your USERRA rights, you need to make a formal written complaint to the Veterans’ Employment and Training Service of DOL (DOL-VETS). 38 U.S.C. 4322(a) and (b). That agency will investigate your complaint and advise you of the results of the investigation. 38 U.S.C. 4322(d) and (e). If the DOL-VETS investigation does not result in a resolution satisfactory to you, you can request (effectively demand) that DOL-VETS refer the case file to the United States Department of Justice (DOJ). 38 U.S.C. 4323(a)(1). If DOJ finds your case to have merit and chooses to take action, it will file suit against DWI in the

appropriate United States District Court and represent you at no charge to you. 38 U.S.C. 4323(a)(1).

If DOJ declines your request for representation, or if you do not request that DOL-VETS refer the case file to DOJ, or if you never complain to DOL-VETS in the first place, you can file suit against DWI in the United States District Court for any district where DWI maintains a place of business. 38 U.S.C. 4323(a)(3) and (c). If you proceed with private counsel and prevail, the court can order DWI to pay your attorney fees. 38 U.S.C. 4323(h)(2).

Regardless of whether you are represented by DOJ or by private counsel that you retain, the remedies that the court can award to you, as a successful USERRA plaintiff, are as follows:

(d) Remedies.

(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2) (A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity powers. The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

38 U.S.C. 4323(d) and (e).

Q: I talked to my uncle, who is a lawyer. He told me that he has neither the time nor the expertise to represent me in this matter, but he said that he thinks that the relevant law is the ADA and that I should file a written complaint with the EEOC. This alphabet soup is confusing. What is the ADA? What is the EEOC?

A: ADA is the abbreviation for the Americans with Disabilities Act. That law requires employers to make reasonable accommodations for persons with disabilities (including but not limited to disabled veterans) in employment. Because you have a disability rated at 40%, you could have ADA rights, but it seems to me that USERRA and section 4212 are much more relevant to your case.

EEOC is the abbreviation for the Equal Employment Opportunity Commission, an independent federal agency—not part of DOL. Before you can sue an employer in federal court under the ADA, you must first make a written complaint to the EEOC, which will try to “mediate” and resolve your complaint. If the mediation efforts are not successful, the EEOC will give you a “right to sue letter” and only then are you permitted to sue the employer in federal court.

The EEOC also performs a similar function under other laws, including the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964.³ The EEOC has no role under USERRA or section 4212.

Q: This stuff is so complicated that my brain hurts. How is a high school graduate like me supposed to figure this stuff out?

A: I invite your attention to www.servicemembers-lawcenter.org. You will find 1,026 articles about military-relevant laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. We add new articles each week, without deleting the articles that are already posted. We added six new articles last week and 169 in 2013. In writing the articles, I make a special effort to make them understandable to non-lawyers. I avoid or at least explain the legal jargon.

I am available by e-mail at SWright@roa.org or by telephone at 800-809-9448, extension 730. I am here at my post answering calls and e-mails during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to make it possible for folks like you to call me or e-mail me from the privacy of your own homes, not from your civilian jobs. As you can appreciate, you have no reasonable expectation of privacy when you are using the employer’s telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer.

³ Title VII forbids discrimination in employment based on race, color, sex, religion, or national origin.