

LAW REVIEW 14039
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Protect your Rights by Understanding them

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- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.3.1.3—Timely application for reemployment
- 1.3.2.11—Vacations, holidays, and days off

Hays v. Communication Technologies, Inc., 753 F. Supp. 2d 891 (S.D. Iowa 2010).

It is very frustrating to me to see a situation where a Reserve Component (RC) member was treated unfairly but there is no remedy, because the RC member was ignorant or misinformed about his or her rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and did not take the necessary steps to preserve his or her rights. This case is a good example of that scenario.

Nathan Hays was an Army Reserve officer, not on active duty. He was not a member of ROA. If he had been a member, perhaps he would have read some of our “Law Review” articles and would have understood what he needed to do to protect his rights.¹

The Army’s Cadet Command (CC) administers the Army Reserve Officers Training Corps (ROTC). At each university with an Army ROTC unit, there is a Professor of Military Science (PMS), in the grade of Colonel or Lieutenant Colonel, who is in charge of the ROTC unit. The PMS needs a staff to conduct the training and administer the unit. Regular Army (RA) officers and enlisted members are assigned to ROTC units, and they are augmented by Army Reserve and Army National Guard officers and enlisted personnel on Active Guard & Reserve (AGR) orders.

In recent years, and especially since the terrorist attacks of September 11, 2001, there have not been enough RA and AGR officers and enlisted personnel to operate and manage Army ROTC units. CC has filled the gap through a contract with Communication Technologies, Inc. (COMTEK). COMTEK hires Army Reserve and Army National Guard personnel (not currently on active duty) to serve as instructors and support staff at Army ROTC units. These COMTEK employees are required to be Army Reserve or Army National Guard members in good standing, but they are not presently on active duty and they are working at Army ROTC units as civilian employees of COMTEK. The officers (instructors) normally wear their Army uniforms at

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,030 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 169 new articles in 2013.

work, so that the cadets will not know which instructors are “real” Army officers on active duty as ROTC instructors and which are COMTEK employees.

There are several published USERRA cases about COMTEK as a civilian employer. This is not surprising, since these employees must be actively participating Army Reserve or Army National Guard members, so it is not surprising that some of them will be called to active duty and others will volunteer for military service. Of course, these COMTEK employees have USERRA rights when that occurs, just like employees of other employers.

Nathan Hays was an employee of COMTEK and was assigned to an “assistant professor of military science” position at Iowa State University (ISU). In late 2007, Hays was notified that his Army Reserve unit would be mobilized in early 2008, and he gave notice to COMTEK and to the ISU PMS. On December 11, 2007, Hays sent an e-mail to Mayola Smith, COMTEK’s staff manager for employee support. Hays informed COMTEK that he would be taking “military leave” starting on February 8, 2008, the expected report date for his Army Reserve unit. He also informed Smith that he would be taking vacation starting on January 16 and that he would be returning to work on February 5 for two days and then departing to report to active duty.

Hays and other members of his unit were asked to report a day or two before the February 8 mobilization date and to perform inactive duty training (drills) in preparation for the mobilization. Hays reported as directed on February 7, and his mobilization orders were canceled that very day, because of his wife’s serious illness. He returned home on Saturday, February 9, released from active duty. He did not report back to work at the ISU ROTC unit on Monday, February 11 or in the immediately following days. This was a serious mistake and was fatal to his USERRA claim against COMTEK.

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 position of employment for the purpose of performing 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.²
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, must report back to work or apply for reemployment within the time limit required by USERRA.

² All involuntary service and some voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 (August 2005) for a detailed summary of the five-year limit and its exemptions.

It is necessary to meet all five of these conditions to have the right to reemployment. Hays failed to report back to work in a timely manner after his mobilization was canceled, so his compliance with the other four conditions is irrelevant.

Under USERRA, the deadline to report back to work or apply for reemployment depends upon the *duration* of the period of service from which the individual is returning. After a period of service of less than 31 days, the individual is required to report to the employer: "(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or (ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person." 38 U.S.C. 4312(e)(1)(A).

After a period of service of 31-180 days, the individual must apply for reemployment within 14 days. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, the individual must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D).

In determining which deadline applies, it is the *actual duration* (not the expected duration) of the individual's period of uniformed service that controls. Hays expected to be on active duty for more than a year, but in fact he was only on active duty for a day or two, before his mobilization orders were canceled because of his wife's illness. Hays was home and off active duty by Saturday, February 9, so he should have reported back to work at ISU on Monday, February 11.

I wish that Hays had contacted me at the time. I would have advised him to report to work on Monday, February 11, 2008. Unfortunately, we did not have the Service Members Law Center (SMLC) up and running in February 2008—we established it in June 2009. As the SMLC Director, I am here at my post at ROA headquarters 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 encourage National Guard and Reserve personnel to call me or e-mail me from the privacy of their own homes, not from their civilian jobs. As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer. Moreover, if the employer is annoyed with you because you have been called to the colors five times since the terrorist attacks of September 11, 2001 and expect to be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

As SMLC Director, I received and responded to 9,193 inquiries in 2013 (766 per month on average) from service members, military family members, attorneys, employers, congressional staffers, reporters, and others. Almost half the inquiries were about USERRA, and the other

half were about everything you can think of that has something to do with military service and law.

Q: Was Hays entitled to leave his civilian job 23 days before his expected mobilization date?

A: Yes. The Department of Labor (DOL) USERRA regulation provides:

“If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is necessitated by the uniformed service.” 20 C.F.R. 1002.74(b).³

It appears that Hays’ wife became seriously ill on the eve of Hays’ mobilization. When Hays gave notice to COMTEK that he would be going on “military leave” on February 8, he had no way of anticipating that his orders would be canceled.

Q: Was Hays entitled to use his COMTEK vacation time during his period of service? What about during the preparation time for expected service?

A: Section 4316(d) of USERRA provides: “Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use *during such period of service* any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.” 38 U.S.C. 4316(d) (emphasis supplied).

If Hays had vacation time in the bank at the time he received notice of his expected mobilization, he had the right to use and be paid for the leave *during his period of service*. He most likely did not have the right to insist on taking leave during his three-week preparation time for his expected mobilization.

³ The citation refers to title 20 of the Code of Federal Regulations, section 1002.74(b).