LAW REVIEW 14042
March 2014

USERRA Rights of Reservist Injured during Drill Weekend

By Captain Samuel F. Wright, JAGC, USN (Ret.)

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
1.3.2.9—Accommodations for disabled veterans

Q: I am the Commanding Officer of a Naval Operational Support Center (NOSC), formerly known as a Naval Reserve Center. I am a member of ROA, and I read your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) with great interest.[1] I am particularly interested in Law Review 0851 (November 2008), titled "More than Workers' Comp: Employer's USERRA Obligation Applies to Reservist Injured on Drill."

In one of the Navy Reserve units supported by this NOSC, a reservist (Let's call him Joe Smith.) on his drill weekend suffered a compound fracture of his left leg while participating in the Physical Readiness Test (PRT). There is no military treatment facility (MTF) nearby, so we took him to our local civilian hospital. The Navy picked up the cost of Joe's emergency room treatment and his overnight hospital stay. He has received a Notice of Eligibility (NOE) that entitles him to military medical care at an MTF for follow-up treatment of the leg injury.

I am concerned about Joe's civilian job and his civilian health insurance coverage, not just for Joe but also for his wife and two young children, one of whom has serious health problems and requires frequent medical attention. Joe's civilian job requires vigorous physical activity—he is a police officer in this town. What do we need to do, and what does Joe need to do, to protect Joe's civilian job and his health insurance coverage?

A: As I 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Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II.

The VRRA made confusing distinctions among different categories of military service: active duty, active duty for training, inactive duty training, initial active duty training, etc. Different

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,033 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 169 new articles in 2013.

rules applied to different kinds of duty. USERRA eliminated these confusing distinctions. USERRA gives an individual the right to reemployment after "service in the uniformed services," and the rules (like how long one has to report back to work or apply for reemployment) depend upon the duration of the period of service, not the category.

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, including the term "service in the uniformed services." That definition includes inactive duty training (drills) as well as active duty, active duty for training, etc. Inactive duty training is treated differently from active duty or active duty for training with respect to the computation of pay and for purposes of the Uniform Code of Military Justice (UCMJ), but for purposes of reemployment rights under USERRA there is no such distinction.

As I explained in Law Review 1281 and other articles, Joe (or any service member) must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a civilian position of employment (federal, state, local, or private sector) for purposes 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 service, relating to the employer relationship for which the individual seeks reemployment. Reserve training periods like Joe's do not count toward the five-year limit. Please see Law Review 201.
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 have been timely in reporting back to work or applying for reemployment.

I hope that Joe gave his employer notice of this specific drill weekend, even if he was performing the drill weekend locally and even if he was not scheduled to work at his civilian job during the weekend in question. Reserve Component (RC) personnel should be advised to give their employers notice of their drill weekends, even when the drill weekends are not expected to conflict with scheduled civilian work, because of the possibility of exactly this sort of scenario.

After a period of service of less than 31 days (like a drill weekend), the service member is required to report back to work "(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).

Joe's period of uniformed service (the drill weekend) was expected to end late Sunday afternoon. Because of the injury and the overnight hospitalization necessitated by the injury, his period of service was likely extended by the Navy until sometime on Monday, when he was released from the hospital.

Because Joe was injured during a period of uniformed service, section 4312(e)(2)(A) of USERRA provides that Joe's deadline to report back to work can be extended by up to two years, while Joe is *hospitalized or convalescing* from that injury. Section 4312(e)(2)(A) provides:

"A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years."

38 U.S.C. 4312(e)(2)(A).

Joe can utilize section 4312(e)(2)(A) to delay his reporting back to work by up to two years, if he is convalescing from the fractured leg for that long. The problem with this approach is that it will mean that Joe will not receive his civilian salary and health insurance coverage while he is convalescing.

Joe should consider reporting back to work as soon as he can and then insisting that the civilian employer (the police department) reemploy him and then make reasonable efforts to accommodate his broken leg, such as by putting him in a "light duty" status working with the police department dispatcher. I invite your attention to section 4313(a)(3), which provides:

"In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed 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--
(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or
(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case."

38 U.S.C. 4313(a)(3).

The employer's duty to accommodate disabilities incurred during a period of uniformed service applies to temporary as well as permanent disabilities. Joe's drill weekend amounts to a period of "service in the uniformed services" for USERRA purposes. Joe's broken leg suffered while performing the PRT during his drill weekend is treated exactly like a broken leg suffered in the explosion of an improvised explosive device while on active duty in Afghanistan. The police department is required to accommodate Joe's broken leg by reemploying him in a "light duty" status until his leg has healed and he can return to his regular patrol duties as a police officer. I do not have a magic wand to wave to make the police chief comply with USERRA, but the law (USERRA) is clear.

ROA established the Service Members Law Center (SMLC) almost five years ago (June 2009) because RC members need ready access to advice and assistance in dealing with situations like Joe Smith's when such situations arise, and they do arise. As the SMLC Director, I am here during regular business hours Monday-Friday and also until 10 pm Eastern Time on Mondays and Thursdays. During 2013, I received and responded to 9,193 inquiries (766 per month on average) from service members, military family members, attorneys, employers, Employer Support of the Guard and Reserve (ESGR) volunteers, Department of Labor (DOL) investigators, congressional staffers, reporters, and others. Almost half of 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.

The point of the evening availability is to encourage RC 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.