LAW REVIEW 14072[1]

June 2014

Don't Quit your Job if you Want to Sue under USERRA

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1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees
1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

Q: I am an Ensign in the Navy Reserve and a member of ROA. I joined the Navy Reserve a year ago, with no prior military service. From August 2008 until a few weeks ago (the end of the 2013-14 academic year), I worked for a small private university in a Southern state, as an untenured assistant professor.

My immediate supervisor (the Associate Dean) and my second-level supervisor (the Dean) were very angry when I joined the Navy Reserve in early 2013, and they told me so on several occasions. Whenever I had to miss a class or other work assignment because of my Navy Reserve responsibilities, they expressed irritation about the inconvenience of finding someone else to cover my work in my absence, and they told me more than once that "you must make a choice. You can teach at this university or you can go play sailor."

I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I printed out three of the articles and provided them to the Dean and the Associate Dean. They referred the matter to the University Counsel, and she told me that because of the state's "right to work law" and its "employment at will doctrine" I can be fired for any reason or no reason and that as an untenured professor I have no rights if the university chooses not to renew my contract for the next academic year. Is that correct?

In January 2014, I got fed up with the harassment from the Dean and Associate Dean, concerning my Navy Reserve service. I said that I would work through the end of the 2013-14

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,300 "Law Review" articles about 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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academic term (May 31, 2014) and not be back in the fall. The deadline for applying for a position for the 2014-15 term passed on June 2, and I did not submit an application.

I thought that I had another opportunity, at another university, to start in the fall semester, but that opportunity did not pan out. Now, I want to sue the university because of the anti-military statements by the Dean and Associate Dean. What do you think?

A: In the first place, let me say that your state's "right-to-work law" is absolutely irrelevant to this issue—this is a red herring brought up by the University Counsel. Under section 14(b) of the National Labor Relations Act (NLRA), a state is permitted to enact and enforce a "right to work law" that makes it unlawful for a union and a private sector employer to agree to a collective bargaining agreement (CBA) that requires the employees to pay a fee to the union as a condition of employment.[3] Your state's right-to-work law has no bearing whatsoever on your USERRA rights.

Yes, your state, like every other state, recognizes and applies the employment at will doctrine. Because you are a non-tenured employee, you can be fired for any reason or no reason, *but not a reason that is forbidden by a specific federal or state law.*

The employment at will doctrine meant a lot more 80 years ago than it means today. In the last 80 years, many federal and later state laws have been enacted that forbid discrimination on the basis of union or concerted activities, race, color, sex, religion, national origin, age, handicapping condition, whistleblowing activities, military service or obligation, etc. USERRA is one of many such laws.

USERRA applies to almost all employers in this country, including the Federal Government, states, political subdivisions of states,[4] and private employers, regardless of size.[5] Under USERRA, you have the job-protected right to be absent from your civilian job for the purpose of performing service in the uniformed services, including inactive duty training (drills), active duty for training (annual training), and voluntary or involuntary active duty. USERRA also makes it unlawful for an employer to deny an individual initial employment, *retention in employment,* promotion, or a benefit of employment on the basis of membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service.[6] If you had applied for a new contract for the 2014-15 academic term and had been denied, you could have challenged the non-renewal of your contract under

[3] The NLRA governs the relationship between employers and unions that represent or seek to represent employees in the private sector generally, with the exception of the railroad and airline industries, which are governed by the Railway Labor Act (RLA). The RLA has no provision that is similar to section 14(b) of the NLRA. Therefore, state right-to-work laws do not apply in the airline and railroad industries.

[4] Political subdivisions include counties, cities, school districts, and other units of local government.

[5] You only need one employee to be an employer for purposes of the federal reemployment statute. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).

[6] 38 U.S.C. 4311(a).

USERRA, claiming that you had been denied retention in employment on the basis of your service in the uniformed services and obligation to perform service.

Because you allowed the deadline to pass without filing an application for a new contract, you have rendered moot any claim that the university violated USERRA. If you sue, the university's easy answer will be "the plaintiff does not have a contract for the 2014-15 academic term because he did not apply by the deadline." The court will not address the hypothetical question of whether the university would have denied your application if you had filed one.

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP), your complaint will be dismissed at the outset if the complaint does not assert facts that, if true, would entitle you to relief that the court can award. Under Rule 11 of the FRCP, your attorney can be sanctioned if he or she files a complaint for which there is no reasonable basis. Given the state of facts as you report them, I see no way that a complaint could be drafted that would survive Rule 12(b)(6) and Rule 11.

Q: In Law Review 1189 (October 2011), you reported that Congress had amended USERRA to make clear that a work environment that is free of military-motivated harassment by the employer is a "benefit of employment" and that depriving a person of such a benefit is a violation of USERRA. I think that the Dean and Associate Dean harassed me because of my Navy Reserve service and obligations, and I want to sue for that harassment. Why does my failure to apply for a new contract preclude me from filing such a lawsuit and prevailing?

A: *If you were still working for the university,* you could conceivably get injunctive relief requiring the Dean and Associate Dean to stop harassing you about the Navy Reserve, but you cannot get money damages for such harassment, unless it resulted in the loss of money (wages, etc.). Because you cannot get money damages and you cannot get injunctive relief, there is no relief that the court could award you, even if you establish that the facts are exactly as you allege them to be. Thus, your complaint cannot survive a motion to dismiss under Rule 12(b)(6).

Section 4323(d) of USERRA sets forth the remedies that are available to the successful plaintiff in a case against a private employer or a state or local government:

(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.

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

As I explained in Law Review 14051 (April 2014) and other articles, money damages under USERRA as currently written are available only for *pecuniary* losses—losses that can be expressed precisely in dollars. For example, let us say that the employer unlawfully fires you or denies you reemployment, and as a result of this violation you lose $100,000 in salary or wages—that is a *pecuniary* loss. Further, let us say that you should have been reemployed and your civilian health insurance should have been restored upon reemployment, but it was not. In order to ensure coverage for yourself and your family, you spend $10,000 out of pocket to purchase a health insurance policy. That is also a pecuniary loss. But things like loss of status, harassment, etc. are not pecuniary, and money damages are not available for such matters under USERRA.

Because you resigned and did not apply for a new contract for the new school year, you are not entitled to injunctive relief, ordering the employer to put you back on the payroll. Because you no longer work for the university, you are not entitled to injunctive relief ordering the university to stop the harassment by the Dean and Associate Dean. Because USERRA only provides for pecuniary damages, you are not entitled to money damages for the harassment. You are not entitled to money damages or injunctive relief. There is no relief that the court can award for you. The case is moot, because of your own actions.

I greatly regret that you did not contact me before you resigned and let the deadline for applying for a new contract pass. If you had contacted me at the time, I would have advised you to handle this matter in a very different manner.

Five years ago (June 2009), ROA established the Service Members Law Center, and I was named the first Director. In 2013, I received and responded to 9,193 inquiries, or 766 per month on average. Almost half of the inquiries (48.6%) were about USERRA, and the other half were about everything you can think of that has something to do with military service and law.

I am here at my post, at ROA headquarters, answering calls and e-mails during regular business hours Monday-Friday and also until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to make it possible for Reserve Component 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 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. Please call me or e-mail me from home, not from work.