LAW REVIEW 16073[1]
August 2016

Don't Tell your Civilian Employer that you Are Trying to Enlist

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Update on Sam Wright

1.1.3.2—USERRA applies to regular military service
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I recently heard from a young man who is trying to enlist in the Navy. Almost a year ago, he gave his civilian employer (a small city) notice that he would need to miss two days of work for an enlistment examination at the Military Examination and Processing Station (MEPS).[3] At the MEPS, he passed the physical examination and scored well on the Armed Forces Qualifying Test. He signed an enlistment contract and took the oath of enlistment, and he was placed in the Delayed Entry Program (DEP) and was told that his recruiter would contact him soon with his report date for basic training. In the last 11 months, the Navy has given him three "firm" report dates for basic training, and each time the Navy has canceled the report date with just a few days of advance notice.

The first time the recruiter gave him a "firm" report date, this young man gave the employer two months of advance notice, and then just two weeks before the young man had expected to

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[1] Please see www.servicemembers-lawcenter.org. You will find more than 1500 "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. I am the author of more than 1300 of the articles.

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[3] Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a person seeking to enlist in the armed forces, either the Active Component (AC) or a Reserve Component (RC), has the right to an unpaid but job-protected leave of absence from his or her civilian job (federal, state, local, or private sector) for the purpose of an examination to determine fitness for the armed forces. USERRA's definition of "service in the uniformed services" includes "a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty." 38 U.S.C. 4303(13).

leave his civilian job to report to active duty the Navy canceled his orders, and he so informed the civilian employer. The employer complained but allowed him to continue working. For the second "firm" report date, the young man gave the employer six weeks of advance notice, and the employer summarily fired him, saying "we will not tolerate this on-again, off-again stuff."

Because that report date and a third "firm" report date was canceled by the Navy, this young man is now in serious financial difficulty. He lost his income from the job, and because he still expects to report to basic training soon he has been unable to find other interim civilian employment. He fell behind in the rent on his apartment and was evicted, and he had to move back in with his parents.

This young man's sad story causes me to reiterate the advice I gave in Law Review 13083 (June 2013):

> If you are considering enlisting (whether in the Active Component, the Reserve, or the National Guard), I strongly suggest that you keep your considerations to yourself, because you have no obligation to consult your employer about this matter. You have no obligation to say anything to your employer until the first time that you will need to be away from work (for a short period or a long period) because of uniformed service. 38 U.S.C. 4312(a).
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> If you are in the process of enlisting in the armed forces, I suggest that you say nothing to the civilian employer until you have a *firm* [emphasis in original] report date that is not likely to slip and until that report date is about a month away. If you give the employer more than a month of advance notice, that will only serve to give the employer the opportunity to make your life miserable as you prepare to serve our country in uniform.

I want to emphasize that it was unlawful for the city to fire this young man when he gave notice of his expected report date for basic training, the second time. The firing violated section 4311(a) of USERRA, which provides:

> A person who is a member of, *applies to be a member of,* performs, has performed, applies to perform, or *has an obligation to perform* service in a uniformed service *shall not be denied* initial employment, reemployment, *retention in employment,* promotion, or any benefit of employment by an employer on the basis of that membership, *application for membership,* performance of service, application for service, or obligation.[4]

[4] 38 U.S.C. 4311(a) (emphasis supplied).

USERRA's legislative history addresses the application of section 4311(a) to a person in the Delayed Entry Program, as follows:

> If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing of the claim should not await completion of the service, even if only for lost wages.[5]

Whether this young man relies on the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) and the United States Department of Justice (DOJ), or whether he obtains private counsel and sues the city in federal court, it is not feasible to get this case investigated and filed and to complete the discovery process and the trial before he reports to basic training.

I invite your attention to Act III, Scene 1 of *Hamlet,* written by William Shakespeare in 1602. This is the famous "to be or not to be" soliloquy contemplating suicide. While contemplating offing himself, Prince Hamlet outlines all that is wrong with human life. One item in a long list is "the law's delays." That situation has not improved in the intervening 414 years.

The 6th Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall have the right to a *speedy* and public trial." (Emphasis supplied.) But that guarantee only applies to criminal trials, which are given priority on federal and state court dockets. The civil cases compete for the limited time that is left, after the criminal trials have been accommodated. The dockets are crowded, and it just takes a long time for the parties to complete the discovery process and then for the court to find time to schedule a trial.

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue replacement for the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. Until the 1980s, the VRRA had a "priority on the docket" clause, giving VRRA cases head of the line privileges on federal court dockets. Congress repealed this docket priority clause, as part of comprehensive legislation repealing docket priority clauses throughout the United States Code. There were so many docket priority clauses that they did not work well. As Frederick the Great said, "He who defends everything defends nothing."

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[5] House Committee Report, April 28, 1993 (H.R. Report No. 103-65, Part 1), reprinted in *The USERRA Manual,* by Kathryn Piscitelli and Edward Still, Appendix B-1. The quoted paragraph can be found on page 665 of the 2016 edition of *The USERRA Manual.*

As I explained in Law Review 200 and Law Review 1049, there are limited circumstances wherein it is feasible to get a court to order another party to do something, or to refrain from doing something, *even before the trial is held.* To get such emergency injunctive relief, one must show both a *likelihood of success on the merits* (when the case finally goes to trial) and *irreparable injury* if the emergency injunctive relief is denied.

The problem is that the Supreme Court has held that it is not ordinarily possible to get injunctive relief to stop a firing. *See Sampson v. Murray,* 415 U.S. 61 (1974). The idea is that a firing, even if ultimately held to be unlawful, is not an *irreparable* injury. If a court eventually finds that the firing was unlawful, the court can order the employer to reinstate the individual and to pay back pay and interest, to compensate the unlawfully fired person for salary, wages, and benefits lost during the interim period, between the firing and the court decision. Because the injury caused by the firing can be repaired, it is not an irreparable injury, or so the argument goes.

In Law Review 200 and Law Review 1049, I discussed *Bedrossian v. Northwestern Memorial Hospital,* 409 F.3d 840 (7th Cir. 2005). The United States Court of Appeals for the Seventh Circuit relied on *Sampson v. Murray* and held that Colonel Carlos Bedrossian (an Air Force Reserve physician) was not entitled to emergency injunctive relief to stop his civilian employer from firing him because of his Air Force Reserve activities.

I do not question the general validity of *Sampson v. Murray,* but I assert that *USERRA is different.* I wrote in Law Review 200: "The 7th Circuit failed to understand that … USERRA is different from all other federal laws that apply to the employment context. In USERRA, the focus is not only on doing justice for the individual; the focus is on the defense needs of the nation. If folks like Colonel Bedrossian … cannot be given a reasonable assurance that their jobs will be protected, they will not volunteer. Without such assurance, they will not be available to protect the nation in the National Guard and Reserve. Worse, others who learn of the situation will be dissuaded from enlisting or reenlisting. It is not sufficient to tell these folks, 'If you win, probably many years from now, you may receive back pay.'" I adhere to these remarks, *now more than ever.*

As enacted in 1994, and as in effect at the time that the 7th Circuit decided *Bedrossian,* USERRA provided: "The court *may* use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits under this chapter." 38 U.S.C. 4323(e) (emphasis supplied).

In Law Review 200, I urged Congress to amend section 4323(e), changing "may" to "shall." Congress did this in 2008. Unfortunately, Congress also added some additional language that only serves to confuse the matter further. As amended, section 4323(e) reads as

follows: “The court *shall* use, *in any case in which the court determines that it is appropriate,* its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights and benefits of persons under this chapter.” 38 U.S.C. 4323(e) (emphasis supplied).

Neither the text of section 4323(e) nor the legislative history of the 2008 amendment shed any light on what standards a court is to use in determining whether it is “appropriate” to enjoin an employer from firing an RC member or a participant in the DEP or to require the employer to reemploy the member promptly upon his or her return from duty. Does *Sampson v. Murray* apply?

I urge Congress to amend section 4323(e) again and to eliminate “in any case in which the court determines that it is appropriate.” In place of this language, Congress should include an explicit congressional finding that the urgent national defense needs of the nation require that the courts use their equity powers to make employers comply with USERRA, sooner rather than later.

In the absence of such an amendment, you should not expect emergency injunctive relief if you are fired while in the Delayed Entry Program and are thereby put in a financial bind while waiting for your basic training report date, which is sometimes delayed by months. It is better to avoid this problem by keeping your enlistment secret from your employer until you are within one month of a *firm* active duty report date.

Yes, this will mean that you will not be able to use USERRA for your MEPS examination dates. It is better to use vacation days at your civilian job or to arrange the MEPS appointment for a day when you are not scheduled to work in any case, so as to avoid the need to inform the employer that you are trying to enlist.

I also urge the Commander, Navy Recruiting Command, and the commanders of recruiting commands in the other services to take action to avoid the kind of situation in which the young man I heard from has encountered. When a service recruits a young person and promises an active duty report date, the service should keep its promise, even if this is inconvenient for the service.