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Did I Waive my USERRA Rights as a Disabled Veteran when I Asked the Employer To Reinstate me and Put me on Sick Leave?

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Q: I am a Staff Sergeant (E-6) in the Marine Corps Reserve (recently retired) and a member of the Reserve Officers Association (ROA).³ I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in your articles about the rights of a Reserve Component (RC)⁴ members who have been called to the colors, wounded in action, and then return to the civilian workforce with significant service-connected disabilities.⁵

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1600 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, 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 1400 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC.

³ In 2013, ROA members amended the ROA Constitution and made noncommissioned officers eligible for full membership in ROA.

⁴ Our nation has seven Reserve Components. In order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army

I have been a state police officer since 2008. I left that job in late 2011 when I was called to the colors. I have read carefully your Law Review 15116 (December 2015), and I think that it is clear beyond dispute that I meet the five conditions for reemployment under USERRA. I left my job for service and gave the employer both oral and written notice. I have not exceeded the cumulative five-year limit on the duration of the periods of uniformed service that I have performed since I began my state police job.⁶ I served honorably and did not receive a disqualifying bad discharge from the Marine Corps. After I left active duty, I applied for reemployment almost immediately, well within the 90-day deadline.

In December 2011, I was involuntarily called to active duty with my Marine Corps Reserve unit.⁷ I deployed to Afghanistan and was wounded in action. My call-up was for seven months, and the other members of my Marine Corps Reserve unit came home in July 2012, but I was retained on active duty until November 2016, when I was medically retired with a substantial disability rating.

Almost immediately after I was finally released from active duty, I applied for reemployment. The chief of the state police insisted that I take a physical administered by a state physician. The personnel department informed me that I had failed the physical and that I would not be reemployed as a police officer.

When I left my job for military service in late 2011, I had 30 days of sick leave in the bank. Because I needed money, I asked the state police department to reinstate me and put me on sick leave. The employer acceded to that request. After my sick leave was exhausted, I was given a new physical, which I also failed. The employer then suspended me without pay until I can pass the physical.

Have my USERRA rights been violated?

A: Yes. When you made a timely application for reemployment and met the five USERRA conditions, almost immediately after you left active duty, the employer had an affirmative duty

National Guard. In the 15 years since the terrorist attacks of September 11, 2001, almost one million RC members have been called to the colors, and thousands have been killed or seriously wounded in combat overseas.

⁵ Please see Law Reviews 16093 (September 2016), 16007 (January 2016), 15065 (August 2015), 15060 (July 2015), 15057 (July 2015), 15037 (May 2015), 14012 (January 2014), 13046 (April 2013), 1144 (April 2011), 1139 (March 2011), 0854 (November 2008), 0640 (December 2006), and 0633 (October 2006).

⁶ Concerning the five-year limit, please see Law Review 16043 (May 2016).

⁷ The result would be the same if you had volunteered. USERRA applies equally to voluntary and involuntary military service. Please see Law Review 1019 (March 2010).

to reinstate you promptly, within ten days after your application.⁸ It was unlawful for the employer to condition your reemployment upon your passing the physical.⁹

Because you met the USERRA conditions, and because you returned with a disability incurred on active duty, the employer was required to make reasonable accommodations to enable you to do the job that you would have attained if you had been continuously employed (probably the job you left). If your disability made it impossible for you to do that job, the employer had the duty to reemploy you promptly in some other job for which you were qualified *or for which you could become qualified with reasonable employer efforts.*¹⁰

The Department of Labor (DOL) USERRA Regulation provides as follows regarding the obligation of the employer in the case of a veteran who meets the USERRA conditions and who returns to work with a disability incurred during the period of service:

§ 1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

- Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her to become qualified to perform the duties of one of these positions:
 - (a) A position that is equivalent in seniority, status, and pay to the escalator position; or,
 - (b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a *higher or lower position*, depending on the circumstances.¹¹

⁸ 20 C.F.R. 1002.181.

⁹ See *Brown v. Prairie Farms Dairy, Inc.*, 872 F. Supp. 2d 637 (M.D. Tenn. 2012). I discuss this case in detail in Law Review 13035 (March 2013).

¹⁰ See 38 U.S.C. 4313(a)(3).

¹¹ 20 C.F.R. 1002.225 (bold question in original, emphasis by italics supplied).

It is likely that your serious disabilities disqualify you from returning to work as a police officer, even with reasonable employer accommodations. If that is the case, the employer is required to reemploy you in some other position for which you are qualified or for which you can become qualified with reasonable employer efforts.

It is possible that there is no job in the state police department for which you are qualified or for which you can become qualified. The employer is the whole state government, not just the state police. Surely there must be a job in the state government for which you can become qualified.

It is the responsibility of the state government to find such a position and to offer you reemployment in that position. In searching for that position, the personnel department must look up (jobs better than the one you left) as well as down, and must look at jobs that are currently filled as well as jobs that are vacant. If the “closest approximation” job is currently filled with another employee, the state must offer you that job even if it means displacing the other employee.¹²

Q: The attorney for the state police insists that I waived the right to reemployment in another position, with accommodations for my disability, by requesting reinstatement on sick leave. What do you say about that?

A: The state police attorney is wrong. Waiver is an affirmative defense available in USERRA cases and civil cases generally, but in view of the remedial purpose of USERRA waiver will not be easily found.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it into law in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA’s legislative history addresses waiver as follows:

The Committee {House Committee on Veterans’ Affairs} wishes to stress that rights under the chapter [USERRA] belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights which are already in existence may be waived. See *Leonard v. United Airlines, Inc.*, 972 F.2d 155, 159 (7th Cir. 1992). An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void.¹³

¹² See *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993).

¹³ House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 660-61 of the 2016 edition of the *Manual*.

The argument that you waived your USERRA rights as a disabled veteran by requesting reemployment as a police officer on sick leave is weak, in my opinion. That purported waiver does not come close to the “clear, convincing specific, unequivocal, and not under duress” standard set forth in the legislative history.

Having said that, let me add that if you had contacted me at the time you applied for reemployment I would have advised you not to request reemployment on sick leave, at least not without making clear that your request was *not to be construed as a waiver*. You could have sent the state police chief a certified letter, something like the following:

I worked as a state police officer before I was called to active duty in 2011, and I gave you notice that I was leaving to perform military service. I meet the qualifications for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was wounded in action in Afghanistan, and I am returning with disabilities incurred in the line of duty. You (my employer) are required to make reasonable efforts to accommodate these disabilities. If the disabilities cannot be reasonably accommodated in my police officer job, the state has the responsibility to reemploy me in some other position for which I am qualified or can become qualified with reasonable employer efforts.

I wish to point out that I have 30 days of sick leave in the bank, left over from my employment before I was called to active duty. I propose that you reinstate me to the payroll and put me in a sick leave status while we sort out the issues about what job I am entitled to and what accommodations I will need. *By requesting sick leave, I am not waiving any of my USERRA rights.*

It is most unfortunate that service members returning from active duty and seeking reemployment in their pre-service jobs do not have readily available qualified lawyers to advise them on issues of this kind. Neither DOL, nor Employer Support of the Guard and Reserve (ESGR), nor military legal assistance attorneys are readily available and qualified to give advice on matters of this kind. I hope that service members will use our “Law Review” articles to find answers to questions related to asserting the right to reemployment.¹⁴

¹⁴ Please see footnote 1.