

LAW REVIEW¹ 19002

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My Civilian Employer Strenuously Objects to my Enlistment

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Q: I am a Private (E-1) in the Army, having enlisted just five months ago. I reported to Army Basic Training on 1/2/2019. I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1700 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, 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 1500 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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

I am 25 years old, and I have five years of service with our local police department. Let's call it the Mudville Police Department (MPD). MPD Chief Floyd Casey was very disappointed and angry at me when he learned that I was considering enlisting in the Army last year. As you advised in Law Review 17102 (October 2018), I kept my enlistment secret until 12/1/2018, one month before my Basic Training report date. When I informed the Chief that I had enlisted and would be reporting to Basic Training just a month later, he became enraged, and my last two weeks at the police department were difficult.

My last day at work was Friday, 12/14/2018. I decided to take the second half of December off to get my affairs in order before reporting to Basic Training on 1/2/2019. After the end of the 12/14 shift, several of my friends at the MPD took me to dinner at a nice restaurant and honored my decision to enlist and wished me God speed. Chief Casey barged in to the restaurant and cursed me out for showing "disloyalty" to the police department by "playing soldier." He said: "You are fired right now" and "Don't you ever darken the door of the police department headquarters."

I have committed to remain on active duty for four years, from January 2019 through January 2023. I am uncertain about reenlisting or about staying on active duty for a career of 20 years or more, and (following the advice you have given in some of your Law Review articles) I said nothing to Chief Casey about intending to return to the police department after I leave active duty.

Will I have the right to reemployment at that time although the police chief fired me in December 2018? How (if at all) should I respond to Chief Casey?

A: If you meet the five USERRA conditions in early 2023, you will have the right to reemployment at MPD in the position of employment that you would have attained if you had been continuously employed (possibly a better job than the one you left) and you will be entitled to be treated for seniority and pension purposes as if you had been continuously employed during the entire time that you are away from work to perform uniformed service. That time will include your four years of active duty and the time between your departure from the job on 12/14/2018 and your entry on active duty on 1/2/2019 and the time (up to 90 days) between your release from active duty and your application for reemployment.³

You already meet the first two conditions, in that you left your civilian job to perform uniformed service and you gave the employer prior oral or written notice. It does not matter that you left your job 18 days before you entered active duty, because you are entitled to time off from the job before entering an extended period of military service to get your affairs in order.⁴ You did not need the employer's permission to enlist in the Army, and you were not required to predict

³ Please see Law Review 60 (December 2002) and Law Review 17121 (December 2017).

⁴ 20 C.F.R. 1002.74(b).

(when you gave notice that you were leaving for service) that you would return and seek reemployment after your release from active duty.⁵

To have the right to reemployment, your cumulative period or periods of uniformed service with respect to your employer relationship with the MPD must not exceed five years.⁶ Moreover, you must be released from the period of service without having received a disqualifying bad discharge from the military.⁷ Finally, you must have made a timely application for reemployment after released from the period of active duty.⁸

It is likely but by no means certain that you will have the right to reemployment with the City of Mudville. You could voluntarily remain on active duty past the five-year limit. You could do something stupid and get a disqualifying bad discharge from the Army. You could get a great job offer elsewhere and choose not to return to the MPD. God forbid, you could die.

At this point, just a few weeks into an active duty period that will likely last four years or more, there is no point in your getting into an argument with the police chief and the city's personnel department about what your USERRA rights may be four years from now.

Q: At this point, it is most unlikely that I will seek reemployment with the city, especially if Floyd Casey is still the police chief when I leave active duty. But I am concerned about the “firing” on my record. At some point in the future, when I apply for a job, I will likely be asked “Have you ever been fired?” How do you suggest that I respond to Chief Casey and the City of Mudville? Was firing me a violation of USERRA?

A: The firing violated section 4311 of USERRA, which provides:

- (a)** 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*.
- (b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has

⁵ 20 C.F.R. 1002.87, 1002.88.

⁶ 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) concerning the five-year limit and the nine exemptions—kinds of service that do not count toward exhausting your five-year limit.

⁷ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial as part of criminal sentences for serious misconduct) and other-than-honorable administrative discharges.

⁸ After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited--

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.⁹

By firing you as you departed the job to report to active duty, the City of Mudville denied you *retention in employment* because you joined the Army and thus violated section 4311. But it is not feasible for you to get a lawyer to take your case on a contingent fee basis. The firing occurred on the same day that you left the job to report for service, so there are no money damages for lost salary or wages.

I suggest that you send a polite letter to the Mayor or City Manager, with a copy to the City Attorney. Tell them that the firing violated USERRA and that you demand that the city rescind the firing.¹⁰ If they don't respond or refuse to rescind the firing, make a formal written USERRA complaint against the city with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).¹¹

⁹ 38 U.S.C. 4311 (emphasis supplied).

¹⁰ The police chief told you, during his tirade at the restaurant, that you were fired, but that does not necessarily mean that the city has fired you.

¹¹ You can make the complaint on-line at www.dol.gov/vets.