LAW REVIEW 197

Tutorial on USERRA Procedures

By CAPT Samuel F. Wright, JAGC, USNR*

Q: I was hired by the XYZ Corporation in January 2000. Three years later, in January 2003, I was called to active duty for two years, until January 2005. I think that I have met all the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA), as you have set forth in Law Review 77. I left my job for the purpose of performing uniformed service. I gave the employer prior notice, in writing by certified mail. My cumulative period of service while employed by the XYZ Corporation does not exceed five years, and because this was an involuntary period of service it does not even count toward my five-year limit, as I understand your Law Review 6.

I made a timely application for re-employment, and I returned to work at the XYZ Corporation Feb. 1, 2005. About three months later, I was required to perform two weeks of annual training with my Reserve unit. I gave the employer proper notice about that period as well. I returned to work at XYZ at 0800 on the next business day after the end of my annual training period. I was properly reinstated in my job, but just a few days later I was fired. This was not a mass layoff—I was the only XYZ employee let go in May 2005.

I promptly contacted the National Committee for Employer Support of the Guard and Reserve (ESGR), the DoD organization established to assist Reserve Component (RC) personnel with problems of this sort. An ESGR volunteer contacted the XYZ human relations (HR) director on my behalf, but the HR director told the ESGR volunteer to "pound sand." I was then referred to an investigator for the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS). I completed the DOL Form 1010, the "Eligibility Data Form."

The DOL-VETS investigator put the burden on me. He asked me to bring him proof that my firing was motivated by the employer's irritation at me for absences from work for military training and service. I brought him what I had, and he said that it was not good enough. He closed my case as "without merit" after sending me a form letter. Then, I read Law Review 184 (September 2005). It seems to me, based on your article, that the burden of proof should be on the employer to prove that I was fired for cause—rather than my having the burden of showing that the firing was motivated by my Reserve service. The firing occurred well within the one-year period after I completed my period of service and returned to work. I made a copy of Law Review 184 and handed it to the DOL-VETS investigator. He refused to accept it or to read it—he said that he only reads official materials that he receives through official DOL channels. Where do I go from here?

A: I am glad that the ROA Law Review articles are being utilized. I initiated the column in *The Officer* (ROA's monthly magazine) in 1997, in order to educate RC members, employers, lawyers, DOL-VETS investigators, and others about rights and obligations under USERRA and other laws. ROA later added the articles to its Web site, www.roa.org. Click on "Legislative Affairs" then "ROA Law Reviews." These articles are having an impact. I receive e-mails from all over the country, and even from Iraq and Afghanistan, with inquiries about USERRA and other laws that have been addressed in the Law Review articles.

As I explained in Law Review 104, Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. For more than 65 years, federal law has provided for the right to re-employment after voluntary or involuntary military service. Congress amended USERRA in 1996, 1998, 2000, and 2004. USERRA is codified in Title 38, United States Code, Sections 4301 to 4334 (38 U.S.C. 4301-4334).

I worked for DOL, as an attorney, for a decade. During that time, I served on the interagency task force that studied the VRR law and proposed what became USERRA. Together with one other DOL attorney, Susan M. Webman, I largely drafted the interagency task force work product that was enacted by Congress, largely unchanged, in October 1994.

Please see Law Review 77 for the USERRA eligibility criteria. To have the right to re-employment, you must meet five simple criteria:

1. You must have left a position of civilian employment for the purpose of performing voluntary or involuntary uniformed service.

2. You must have given the employer prior oral or written notice.

3. Your cumulative period or periods of uniformed service, relating to that employer relationship, must not have exceeded five years. All involuntary service and some voluntary service are excluded from the computation of the five-year limit. See Law Reviews 6 and 42.

4. You must have been released from the period of service under honorable conditions.

5. You must have made a timely return to work or application for re-employment.

As the person seeking re-employment, you have the burden of proof on these eligibility criteria. In your case, as in most such cases, there appears to be no real doubt that you

met all five criteria in January 2005, when you returned from your two-year mobilization, and again in April 2005, when you returned from your two-week annual training tour.

To say that the complainant has the burden of proof is not to say that the DOL-VETS investigator was correct to put this burden on you personally. These DOL-VETS investigators are well paid and should be well trained, and they have subpoena authority, which you lack. There is no excuse for putting the burden on the individual complainant, but that happens all too often.

The investigator also seems to be confusing a Section 4311 case with a Section 4312 case. In a Section 4311 case, the plaintiff must establish (in court, if it comes to that) that the plaintiff's membership in a uniformed service, performance of service, or application or obligation to perform service was *a motivating factor* (not necessarily the sole reason) in the employer's decision to deny the plaintiff initial employment, retention in employment (*e.g.,* firing), or a promotion or benefit.

A Section 4312 case is much easier, because it does not require you to get inside the employer's brain, so to speak. In a Section 4312 case, you are only required to prove that you met the five simple, objective criteria. If you meet those statutory requirements, you have the *"unqualified* right to reemployment." H.R. Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2458 (emphasis supplied). I also invite your attention to Law Review 61.

As I explained in Law Review 185, Section 4316(c) of USERRA [38 U.S.C. 4316(c)] provides that a person who is re-employed after more than 180 days of service, as in your case, shall not be discharged from such employment, except for cause, within one year after proper re-employment in the civilian job. If this period of special protection has not expired, *the employer has the burden of proof.* The employer can meet this burden in one of two ways. First, the employer can show that you were guilty of such misconduct or poor performance that employers generally would consider a fair reason for firing, and that you had been given fair notice that misconduct or poor performance of that nature would be considered grounds for firing. Second, the employer could show that, in the ordinary course, you would have been discharged or laid off, for lawful reasons unrelated to your military affiliation, *even if your employment with that employer had not been interrupted by uniformed service.* Based on the facts as you have explained them, it seems most unlikely that the employer will be able to meet its burden of proof on this "cause" question.

Q: The DOL-VETS investigator sent me a form letter, informing me that my USERRA case had been closed as "without merit" because I had not produced evidence showing a connection between the firing and my military service. It is my understanding, based on having read your "Law Review" articles, that I am entitled to insist that DOL refer my case to the attorney general for consideration of representation, regardless of the DOL "no merit" determination. Is that correct?

A: Yes. "If the efforts of the Secretary [of Labor] with respect to any complaint filed under subsection (a) do not resolve the complaint, the Secretary shall notify the person who submitted the complaint of—(1) the results of the Secretary's investigation; and (2) the complainant's entitlement to proceed under the enforcement of rights provisions provided under section 4323 (in the case of a person submitting a complaint against a State or a private employer) or section 4324 (in the case of a person submitting a complaint against a Federal executive agency or the Office of Personnel Management)." [38 U.S.C. 4322(e).]

It is my understanding, and I drafted this language, that DOL is *required* to refer *any* USERRA case to the Department of Justice (DOJ), upon completion of the DOL investigation and upon request of the complainant. (If the case is against a federal executive agency, the referral is to the Office of Special Counsel rather than DOJ.) The duty to refer is not limited to cases that DOL has found to be meritorious.

DOL-VETS should have informed you of your right to request referral of your case file to DOJ. But your right to request such a referral comes from section 4323(a)(1) of USERRA, 38 U.S.C. 4323(a)(1). Your right does not come from a DOL letter informing you of that right. DOL's failure to inform you of that right does not deprive you of the statutory right. If you want DOL to refer your case file to DOJ, for consideration of representation, I suggest that you send a *certified* letter to:

Honorable Charles Ciccolella (or his successor)
Assistant Secretary for Veterans' Employment and Training
United States Department of Labor
200 Constitution Ave. NW
Washington DC 20210

Before you send the certified letter, you should contact the DOL-VETS investigator and give him one last chance to do his duty at his level. As in the military, we respect the chain of command and we try to resolve matters at the lowest possible level, but we do not have infinite patience when subordinate officials fail to fulfill their responsibilities.

DOL can, and has, referred USERRA cases to DOJ with negative recommendations—we are referring you this case file because the complainant has requested that we do so, but we (DOL) do not believe the case to have merit. The final call as to whether to offer you legal representation in your USERRA case is to be made by DOJ, not DOL.

I invite your attention to Law Review 148, "Good News on USERRA Enforcement." In October 2004, responsibility for enforcing USERRA, within DOJ, was transferred from the Commercial Litigation Branch in DOJ's Civil Division to the Employment Litigation Section in DOJ's Civil Rights Division. This was a big improvement. USERRA cases received short shrift in the Civil Division. They are

receiving the attention they deserve in the Civil Rights Division. David Palmer is the Chief of the Employment Litigation Section. He and his staff give careful consideration to all USERRA cases referred from DOL, and this includes cases referred with negative recommendations.

Q: I have been searching for an attorney willing to represent me in this matter. I contacted an RC judge advocate that I know through my Reserve unit. He told me that because I had made a formal complaint to DOL I am now precluded from suing the employer through a private lawyer that I might retain. Is that correct?

A: No, that is wrong. Educating RC judge advocates has been a priority of mine for many years. It frustrates me when these folks give legal advice off the tops of their heads. They should first read the statute and then read my "Law Review" articles before giving advice that folks like you are likely to rely upon.

"A person [like you] may commence an action for relief with respect to a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary [of Labor] for assistance under section 4322(a) of this title;
(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or
(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph. [38 U.S.C. 4323(a)(2).]

If you have a lawyer and are ready to proceed to file suit against the employer, I suggest that you first send a certified letter to the Hon. Charles Ciccolella or his successor. Tell the Assistant Secretary of Labor for Veterans' Employment and Training that you have chosen not to request referral of your USERRA case to DOJ. DOL should have explained all of this to you by letter, but DOL's failure to have done so does not detract from your substantive and procedural rights under this statute.

Because of the 11th Amendment to the U.S. Constitution, special rules apply to cases against state governments, as employers. (Political subdivisions of states do not have 11th Amendment immunity.) The attorney general brings cases against state governments in the name of the United States, as plaintiff. Please see Law Review 89. It is fortunate that your case is against a private employer, not a state.

Q: I have been unemployed since the employer unlawfully fired me in April 2005. I have only made a small amount of money on short-term "gigs" elsewhere, but I have been diligently seeking employment. I don't have money to pay a lawyer up front. How am I to get a lawyer to take my case?

A: "In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses." [38 U.S.C. 4323(h)(2).] Bring this provision to the attention of lawyers whom you contact, and also inform them of this and other "Law Review" articles on ROA's Web site.

Q: I talked to a lawyer at great length. She initially seemed quite interested in representing me, but when she became aware that DOL had closed my case as "without merit" she lost interest fast. She said, "DOL is the expert in matters of this kind. If DOL thinks that your case lacks merit, who am I, as a private lawyer, to think that I can make a winning case out of this?" Where do I go from here?

A: I can certainly see where that would be a problem, but I am aware of cases wherein diligent and resourceful private lawyers have undertaken *and won* cases that DOL had closed as "without merit." I invite your attention to Law Review 128.

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