LAW REVIEW 203

Is the Right to Re-employment Absolute?

By CAPT Samuel F. Wright, JAGC, USNR*

Q: I found Captain Wright's Law Review 77 ("I Am Being Demobilized—What About My Civilian Job?") while doing research on the Internet. Like Captain Wright, I am a captain in the Navy Reserve Judge Advocate General's (JAG) Corps. I also am a partner in the employment law section of a major law firm. I represent employers in cases brought by employees, under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws.

In Law Review 77, Captain Wright states that a person who meets the USERRA eligibility criteria has an *unqualified* right to re-employment in the civilian job. I think that Captain Wright is, in his zeal for servicemembers, overstating what USERRA provides. The right to re-employment is not unqualified—read the law. The employer is not required to re-employ the returning servicemember if doing so is "impossible or unreasonable" or creates an "undue hardship." I think that ROA needs to tone down Captain Wright in this respect. [This is a summary of an e-mail sent to ROA Executive Director LTGen Dennis McCarthy.]

A: If you are accusing me of trying to "push the envelope" for the brave young men and women who serve in the armed forces, I plead guilty. For the last 29 years, since I graduated from law school and joined the Navy JAG Corps, my principal focus has been on protecting the legal rights of servicemembers, Active and Reserve Component.

I stand by my statement, in Law Review 77 and several of my articles, that the right to re-employment is unqualified, subject only to the very narrow affirmative defenses for which the employer bears a heavy burden of proof. My conclusion is buttressed by USERRA's legislative history. "Section 4312(a) would provide an *unqualified* right to reemployment to persons who leave other than temporary positions to serve on any type of military duty, whether voluntary or involuntary, if the notice requirement of subsection (a)(1) is met, the cumulative length of military service found in subsection (a)(2) is not exceeded and the reporting or application requirement of subsection (e) is complied with. This section applies with equal force to employers of private employees, state and local governments and the Federal Government." [House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2457 (emphasis supplied).]

I also invite your attention to Section 4312(h) of USERRA: "In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [five-year limit] and the notice requirements established in subsection (a)(1) and the

notification requirements [applying for reemployment after service] established in subsection (e) are met." (38 U.S.C. 4312(h).)

I discuss the implications of Section 4312(h), including the legislative history and case law, in detail in Law Review 30. It is clear that Congress explicitly precluded the application of any "balancing test" or "rule of reason." Yes, this law imposes a burden on civilian employers, and sometimes on fellow employees who are not called to the colors. When Congress originally enacted the right to re-employment in 1940, as part of the Selective Training and Service Act, Senator Thomas of Utah (principal proponent of the right to re-employment) acknowledged the burden but asserted that it was justified "because the lives and property of employers, as well as everybody else in this country, are protected by such military service." His colleagues accepted the argument and enacted the legislation.

"**An employer is not required to reemploy a person under this chapter if – the employer's circumstances** have so changed as to make such reemployment impossible or unreasonable." [38 U.S.C. 4312(d)(1)(A).] Essentially the same language has appeared in the re-employment law since the beginning, in 1940. This has always been seen as a very narrow affirmative defense for which the employer bears a heavy burden of proof.

"The very limited exception of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof [*see Watkins Motor Lines, Inc. v. deGalliford,* 167 F.2d 274, 275 (5th Cir. 1948); *Davis v. Halifax Cty. Sch. System,* 508 F. Supp. 966, 969 (E.D.N.C. 1981)], is only applicable 'where reinstatement would require the creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran.' (*Davis, supra,* 508 F. Supp. at 968.) 'It is also not sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application.' [*Davis, supra. See also Fitz v. Bd. Of Education of Port Huron,* 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *affirmed,* 802 F.2d 457 (6th Cir. 1986); *Anthony v. Basic American Foods,* 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 709 (8th Cir. 1983)."] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2458.

In your e-mail to General McCarthy, you also referred to the "undue hardship" affirmative defense. Please note that this defense "applies only where a person is not qualified for a position due to a disability or other bona fide reason after reasonable efforts have been undertaken to qualify the person." *Id.*

Saying that the right to re-employment is essentially absolute and unqualified does not mean that I countenance RC members who abuse their civilian employers. USERRA is a very valuable shield to protect your civilian job rights when you are called to the colors. Congress did not intend that you use USERRA and your RC affiliation against your employer. As in other contexts, abusers can poison the waters for legitimate users.

For two decades, ROA has sought to persuade Congress to enact tax breaks or other benefits for employers of RC personnel, but no such legislation has been enacted. We really thought that something would be enacted during the "lame duck" session at the end of 2004, but that expectation was dashed. Our effort continues.

*Military title shown for purposes of identification only. The views expressed are the personal views of the author and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government.