

## RECENT USERRA VICTORY

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The United States Court of Appeals for the 8th Circuit recently decided an important case under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The case is *Maxfield v. Cintas Corp.*, 2005 Westlaw 2839762 (8th Cir. October 31, 2005).

Cintas hired David Maxfield, an Army Reservist, in July 1999 and fired him in August 2002. During that three-year period, Maxfield exercised his right to take military leave 15 times (not including weekend drills). One of these periods was from July 15 to September 28, 2001. During that period, someone from Cintas who identified himself as Maxfield's "boss" called Sergeant First Class Tarrance Grissett, USA, who was responsible for preparing Maxfield's orders. The Cintas representative inquired as to whether Maxfield was present for duty and whether his military duty was "imperative." SFC Grissett responded affirmatively to both questions.

Maxfield performed another long period of service from January 24 to June 15, 2002, and a short period on August 19, 20, and 23, 2002. For reasons that are not entirely clear, Maxfield was recorded as having been on sick leave on August 23. Maxfield's boss accused him of "stealing" from the company and suspended and then terminated him. Maxfield filed suit against Cintas in the U.S. District Court for the Eastern District of Arkansas, contending that the termination violated Section 4311 of USERRA, 38 U.S.C. 4311. The District Court granted the employer's motion for summary judgment, and Maxfield appealed to the Court of Appeals, which overturned the summary judgment and remanded the case to the District Court for trial.

"We also agree with Maxfield that the district court erred in holding that he failed to present sufficient evidence that his military status was a motivating factor in Cintas's decision to terminate him. As to proximity [in time], Maxfield was suspended the day he returned from the three-day [military] leave and discharged a few days later. Sergeant Grissett testified that, as in 2001, someone from Cintas called him in August 2002 asking whether Maxfield was present for duty and whether his presence was necessary." Maxfield, page 7.

"Nor, as Cintas argues, does the fact that it granted Maxfield 15 military leaves of absence in 3 years negate a showing of discriminatory motive. Indeed, a jury could infer that because it had granted the leaves, many of which were, in Lewis's words, 'last minute,' Cintas was looking for a reason to discharge Maxfield because of the large number of absences from work due to Maxfield's Reserve status. See *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir. 2002)." Maxfield, page 8.

The Court of Appeals overturned the summary judgment for the employer. Now, the case is back in the District Court for trial. Maxfield will get his day in court-the opportunity to prove his case to a jury, or not. Another possibility is that the employer will offer a cash settlement. In my experience, when an employee can survive a summary judgment motion or get a summary judgment overturned on appeal, the employer will often settle.

Let us take a step back-what can we learn from cases like Maxfield and Leisek? I invite the reader's attention to Law Reviews 30 and 203. USERRA rights are essentially unlimited and unqualified, and USERRA applies to voluntary as well as involuntary service. Having said that, I do not countenance the way that Maxfield has treated his employer here. Yes, Maxfield has the right to 15 military leaves of absence in three years, often on very short notice. There is essentially no legal limit, but at some point there must be a practical limit. Treat your employer this way, and you will get fired-I can virtually guarantee it. You may win in court, but at some point you must go back to work, for this employer or another. Beware the win the battle and lose the war scenario.

I also address this advice to the leadership of each Reserve Component, from the commanding officer level and up. Maxfield is by no means the first published case about the serial volunteer syndrome-I know of many more published cases, plus a lot more situations that have come to my attention personally as I have been contacted by reservists or by employers. Sending a guy like Maxfield 15 times in three years is probably not the wisest course. If you have money or "man days" available, spread them around to different folks in the unit. Don't keep sending Maxfield just because he is available. At some point, you need to tell Maxfield, or someone like Maxfield, "You have done enough. I am going to find somebody else this time."

In Law Review 203, I wrote, "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 well for legitimate users." Maxfield had not yet been decided when I wrote Law Review 203, but it illustrates very well several of the points that I made in that article. •

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