

Massachusetts Law Protecting The Civilian Jobs Of National Guard Members On State Active Duty

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Today's National Guard traces its origins to 1636, when the Massachusetts Bay Colony established the Massachusetts militia to defend the colony against attacks by the Pequot Indians. The Massachusetts Legislature has enacted a provision to protect members of the Massachusetts Army National Guard and the Massachusetts Air National Guard when they are on state active duty, called by the Governor of Massachusetts for state emergencies like fires, floods, riots, etc. Very recently (September 2014), Governor Deval Patrick signed into law House Bill No. 4109, which made several favorable changes to the Massachusetts law.

Under federal legislation enacted very early in the 20th Century, state militia forces have been given major federal assistance in pay, training, and equipment and have been given federal status as part of the Army National Guard of the United States, one of the seven Reserve Components of the United States Armed Forces.³ After World War II, when the Air Force became a separate service rather than part of the Army, Congress created the Air National Guard of the United States as a similar hybrid state-federal military service.

Robert Gould Shaw V is a Staff Sergeant (SSG) in the Massachusetts Army National Guard. When he enlisted, he took two enlistment oaths, one to the State of Massachusetts and one to the United States of America. He joined two overlapping but legally distinct organizations. The *Massachusetts Army National Guard* is the present-day equivalent of the Massachusetts State Militia. The Army National Guard *of the United States* is one of the seven Reserve Components of the United States armed forces.

In his state status, Shaw performs monthly periods of inactive duty training (drills), usually on weekends, and annual training periods of about two weeks, usually in the summer.⁴ The federal

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³ The other six Reserve Components are the Army Reserve, the Air National Guard of the United States, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. The Army National Guard and Air National Guard have this hybrid state-federal status, while the other five Reserve Components are purely federal entities.

⁴ In the 13 years since the terrorist attacks of September 11, 2001, annual training tours and inactive duty training periods have become longer and more frequent, as the Army National Guard has transitioned from a strategic reserve available only for World War III to an operational reserve routinely federalized for intermediate military operations like Iraq and Afghanistan.

law called the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵ protects Shaw from discrimination with respect to his civilian employment⁶ and gives him the job-protected right to time off (without pay) from his civilian job to participate in this federally funded training duty.

As a Private First Class in 2006, Shaw was called to federal active duty and deployed to Iraq for a year. In 2011, as a Sergeant, Shaw was again called to federal active duty and deployed outside the United States, this time to Afghanistan. USERRA protects Shaw's civilian job when he is called to this federal active duty, or if he volunteers for federal active duty.

In his state status, Shaw is subject to being called to state active duty by the Governor of Massachusetts for state emergencies. He has been called to state active duty several times for major snowstorms, a fire, and a prison riot. USERRA does not protect Shaw's civilian job when he is away from the job for this sort of state-funded state active duty.

Like every other state, Massachusetts has enacted a state law (Massachusetts General Laws Annotated, chapter 33, section 13) that protects the civilian jobs of Army National Guard and Air National Guard members on state active duty. In December 2014, a major blizzard causes devastation in western Massachusetts. Governor Deval Patrick calls up SSG Shaw and his Army National Guard unit and deploys them to western Massachusetts to protect life and property. Benedict Arnold III, owner of the restaurant where Shaw works as a cook, is annoyed by this short-notice call-up and refuses to reinstate Shaw to his job when he returns from a week of state active duty.

Arnold's refusal to reinstate Shaw is a violation of Massachusetts General Laws Annotated, chapter 33, section 13. Arnold is apparently guilty of a misdemeanor, punishable by imprisonment for up to six months and a fine of up to \$500. But a busy prosecuting attorney may not give a high priority to cases of this kind, and Arnold may choose to take his chances, thinking that it is most unlikely that such a criminal case will ever be brought. Moreover, fining Arnold and putting him in jail does not get Shaw his job back.

We suggest that the Massachusetts Legislature strengthen this law by adding an explicit private right of action (giving a person in Shaw's situation the right to sue the employer in state court) and giving Shaw or a person in his situation the right to collect attorney fees if he or she files the suit through private counsel and prevails.

Frederica Douglass lives in Nashua, New Hampshire and is a Second Lieutenant in the New Hampshire Army National Guard. When not on military duty, she commutes daily to her civilian job in Lowell, Massachusetts. New Hampshire Governor Maggie Hassan calls Douglass and her

⁵ USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). For more than 800 articles about USERRA, we invite the reader's attention to www.servicemembers-lawcenter.org. At that website, you will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

⁶ Shaw works as a cook at one of Boston's finest restaurants.

Army National Guard unit to state active duty for the same blizzard that led the Massachusetts Governor to call up Shaw.

Does the Massachusetts law (Massachusetts General Laws Annotated, chapter 33, section 13) protect Second Lieutenant Douglass? Yes, as amended by House Bill No. 4109, in September 2014. As amended, the Massachusetts law now refers to the armed forces (National Guard) of another state or territory as well as the Commonwealth of Massachusetts. This 2014 amendment is probably not retroactive. It only applies to situations that arise after the 2014 amendment. If Frederica Douglass was fired in 2013 because of her call to state active duty by the Governor of New Hampshire, this 2014 amendment does not apply to her situation.