

No Kansans Allowed: Missouri And Veterans Of The War On Terror

By Nathan M. Richardson¹

REEMPLOYMENT ENFORCEMENT IN MISSOURI

In a previous article, we addressed the issue of weak enforcement mechanisms for service members in the National Guard.² Although an overwhelming majority of states provide some form of reemployment protection for their respective Guard personnel, many state legislatures have failed to enact provisions that would effectively incentivize employers to comply. A typical example would be classifying a violation of a service member's reemployment rights as a misdemeanor, and providing no cause of action for the service member to sue the employer in civil court. Missouri offers no cause of action against reemployment violators in civil court; however, it does provide an iron-fisted penalty as a disincentive for employers who might consider violating the employment rights of a special category of veterans.

SPECIAL PROTECTION FOR WAR ON TERROR VETERANS

Missouri law provides a significant incentive to employers to adhere to USERRA, at least for those veterans who meet the legal criteria of a "war on terror veteran." Missouri Revised Statutes Section 288.042 defines the term "war on terror veteran:"

1. For purposes of this section, a "war on terror veteran" is a *Missouri resident* who serves or has served in the military and to whom the following criteria apply:
 - (1) The person is or was a member of the National Guard or a member of a United States Armed Forces reserves unit who was officially domiciled in the State of Missouri immediately prior to deployment;
 - (2) The person was deployed as part of his or her military unit at any time after September 11, 2001, and such deployment caused the person to be unable to continue working for his or her employer;
 - (3) The person was employed either part time or full time before deployment; and
 - (4) A Missouri court or United States district court located in Missouri has found that the person was discharged from or laid off from his or her nonmilitary employment during

¹ Nathan M. Richardson has completed his first year of law school and George Washington University in Washington, DC and is a summer associate, providing very valuable legal research assistance to the Service Members Law Center.

² Please see: *Missouri's Reemployment Protections for National Guard Members*, July 2014

deployment or within thirty days after the completion of his or her deployment...
[Emphasis supplied]...

...

Veterans who meet these requirements receive a number of protections. Most notable, however, is the fine an employer faces for discriminating against “war on terror veterans” and the requirement to maintain a “similar work schedule.” Section 288.042 continues:

4. Any employer who is found in any Missouri court or United States district court located in Missouri to have terminated, demoted, or taken an adverse employment action against a war on terror veteran due to his or her absence while deployed shall be subject to an administrative penalty in the amount of *thirty-five thousand dollars*...[emphasis supplied]

5. A war on terror veteran shall be considered to have been discharged from his or her employment if he or she is not *offered the same wages, benefits, and similar work schedule* upon his or her return after deployment.

THE KANSAS COVERAGE GAP

A significant coverage gap exists due to the statute’s residency requirements. Kansas City, a substantial business and residential center for both states, sits squarely on the border.³ It is very foreseeable that a “veteran of the war on terror,” even one who is a member of the Missouri National Guard, could be a Kansas resident. These individuals may not avail themselves of the benefits that Missouri makes available to its veterans of the war on terror unless they take action to make themselves Missouri residents before filing a complaint against their employers.⁴

For example, Omar Bradley is a resident of Kansas. Bradley works as a conductor for the Market Garden Railroad Company, a business that is incorporated in Delaware with its principal place of business in Kansas City, Missouri. Bradley is also a light infantry platoon leader in the Missouri Army National Guard. The Defense Department calls Bradley’s unit to active duty for a nine-month deployment to Afghanistan. On his first patrol, Bradley’s unit is ambushed by a brigade-sized swarm of Taliban and foreign fighters. Bradley demonstrates military genius and forces the Taliban into a full retreat. Despite the fact that his men have no ammunition and are have no air or artillery support, Bradley gives pursuit. On the Pakistan border, Bradley and his men engage a division-sized complement of Taliban fighters, using their M-4s and helmets as clubs. After devastating the Taliban, Bradley captures Ayman al-Zawahiri, Al Qaeda’s spiritual leader, and Jalaluddin Haqqani, leader of the Haqqani network. They had just obtained seven tactical nuclear devices from the notorious arms dealer Fares Mana’a and intended to use them on major American cities. Bradley captures Mana’a, as well. Using nothing but his steely gaze, Bradley forces

³ I recently heard a speech by Kansas Governor Sam Brownback, at the Heritage Foundation here in Washington. Governor Brownback stated that 45% of the Kansas City metropolitan area is in Kansas and the other 55% in Missouri.

⁴ Moreover, moving to Missouri would apparently not solve the problem, since section 288.042(1) requires that the person have been “officially domiciled in the State of Missouri immediately prior to deployment.”

his prisoners to surrender intelligence that reveals the total composition, disposition, and strength of Al Qaeda, the Taliban, and the Haqqani network around the world. After passing this information on to his superiors, the United States is able to effectively eliminate every single terror cell belonging to these organizations around the world.

Bradley spends the rest of his deployment building schools and roads in Afghanistan. His efforts increase the literacy rating in Afghanistan to 98% within three months. The people adore him, embrace a republican form of democracy, and attempt to have him elected president. Bradley, like Cincinnatus, wants only to return to his simple life as a citizen. He humbly declines and returns home, amidst general clamor and lobbying by the Afghan population to become the fifty-first state.

After an awards ceremony in the White House Rose Garden, where Bradley accepts his Medal of Honor and receives a promotion to First Lieutenant, Bradley returns to Kansas City to resume working as a conductor for the Market Garden Railroad. His manager, Montgomery, who always hated Bradley, knows he must hire him back under USERRA. However, he puts Bradley on the loathsome night shift. Previously, Bradley had worked from 7:00 AM to 5:00 PM. Montgomery shrugs. "USERRA only requires me to give you the job you *would have had* if you had never left, or a position of like status, seniority, and pay⁵. You weren't due for a promotion, and this is not a demotion. You even get the same benefits. It's the same job, just with different hours."

Bradley is outraged and promises to sue Montgomery. Bradley goes home, does some peremptory research, and finds Missouri Revised Statute Section 288.042. He makes an appointment with a local attorney, hoping to crush Montgomery with the mandatory \$35,000 fine the statute levies against employers who violate the rights of war on terror veterans. He thinks he can use paragraph 5 in particular:

5. A war on terror veteran shall be considered to have been discharged from his or her employment if he or she is not offered the same wages, benefits, *and similar work schedule* upon his or her return after deployment.

While waiting in the lawyer's office, Bradley notices another soldier, a nervous, slender man with a sloppy uniform. He introduces himself as Captain Dahlberg of the Kansas National Guard, recently returned from Afghanistan. Bradley politely asks about Dahlberg's service, and learns his sole contribution to the war effort in a six-month deployment to the U.S. Embassy in Kabul was the creation of a single slide presentation that helped visiting dignitaries select from among a menu of thirty-one flavors of ice cream available in the nearby cafe. Dahlberg claims to have PTSD from "the day the air conditioning failed" and that he is pending a court martial for violations of General Order No. 1 and sexual harassment charges. He too experienced a violation of his Missouri reemployment rights after a state activation. Ignoring the disgusted look on Bradley's face, Dahlberg heartily recommends the attorney Bradley is about to consult. "As soon as he showed my deployment records to the judge, the judge knew I was a war on terror veteran and hit my

⁵ Montgomery is correctly citing 38 U.S.C. 4312, part of the body of laws enacted by USERRA.

employer with the thirty-five-thousand dollar fine. That will teach SleezeeDeal Cash Advance not to mess with their veteran employees!”

After ordering Bradley to salute him and reminding him of the importance of military decorum, Dahlberg slouches off to take a call from his favorite marijuana dealer. Bradley goes in to see his lawyer. The lawyer shakes his head. “I’m sorry, but you will not be able to use the Missouri statute to support your case. You see, according to Missouri law, you are not a veteran of the war on terror.”

Bradley is in shock. He mentions that he met Captain Dahlberg in the lobby, and that if Dahlberg is a war on terror veteran, surely Bradley must meet the criteria. Dahlberg wasn’t even in the *Missouri* National Guard! “No,” the lawyer agrees, “but he was a Missouri *resident*. He lives in Kansas City, on the Missouri side. You live in Kansas. You have to be a Missouri resident to be a ‘war on terror veteran.’”

The lawyer, unfortunately, is correct. Holding a Missouri residence is clearly a threshold requirement for status in Missouri as a “war on terror veteran.” Additionally, there does not appear to be a requirement for membership in the Missouri National Guard. In other provisions, the Missouri legislature has clearly distinguished between members of the National Guard in general and the National Guard of Missouri. When such a distinction has already been made by a legislature, and the legislature does not make that distinction in subsequent legislation, there is a legal presumption that the statute applies across the board, rather than solely to the special, previously distinguished category. Accordingly, as in the above scenario, a service member does not even have to be enlisted in the *Missouri* National Guard to receive classification as a “war on terror” veteran, as long as that person is a *resident* of Missouri.

Fortunately for Bradley, there is another legal presumption. Residence is presumed at the time of making the complaint, not at the time of the offense. All he has to do is move across the border and become a Missouri resident before filing his complaint against Montgomery. However, if he refuses to relinquish his residential status in Kansas, Bradley will be out of luck.

MISSOURI NATIONAL GUARD UPDATE

(September 2018)

By Captain Samuel F. Wright, JAGC, USN (Ret.)

On 6/14/2017, the Governor of Missouri signed into law Senate Bill No. 108. That law added “any Missouri employee who is a member of the national guard of another state and who is called into state duty by the governor of that state” to the coverage of section 40.490.

For example, Josephine Smith lives in East Saint Louis, Illinois and is a Specialist (E-4) in the Illinois Army National Guard. For her civilian job, she commutes across the Mississippi River to Vidkun Quisling’s Norwegian Seafood Restaurant in Saint Louis, Missouri. After a major tornado strikes southern Illinois, the Governor of Illinois calls Smith to Illinois state active duty. Smith is away from

her Missouri job for three weeks of state active duty. When she is released from state active duty, Mr. Quisling refuses to reinstate her to her job at the restaurant.

Prior to the 2017 amendment, a person in this situation had no legally enforceable right to reinstatement in the civilian job. After the amendment, section 40.490 accords the right to reinstatement to a person in this situation.

The 2017 amendment also added the following sentence to section 40.490: “The attorney general [of Missouri] shall enforce the reemployment rights contained in this section for members of the state military forces ordered to state duty by the governor.” Missouri now has an effective enforcement mechanism, and Missouri is now entitled to a “yes” on each of the four questions.