

Washington Law Protects The Civilian Jobs Of National Guard Members On State Active Duty

By Matthew Z. Crotty¹

From time to time members of the Army and Air National Guard are mobilized for state active duty (SAD) by the Governor of Washington or another state governor. Such SAD usually relates to mobilization for fighting fires or responding to riots, floods, tornadoes, or other natural disasters. Washington law provides significant reemployment protections for individuals who are activated under SAD orders and provides anti-discrimination protections for individuals activated under SAD orders.

As a starting point, Revised Code of Washington (RCW) section 73.16.033 mandates reemployment of military members activated for service in the uniformed services “upon order from competent authority.” As such, competent authority includes the Governor of the State of Washington who, in turn, has authority to activate National Guard members for SAD.

RCW 73.16.033 provides, in full:

Any person who is a resident of this state *or is employed within this state*, and who voluntarily or upon order *from competent authority*, vacates a position of employment for service in the uniformed services, shall, provided he or she meets the requirements of RCW 73.16.035, be reemployed forthwith: PROVIDED, That the employer need not reemploy such person if circumstances have so changed such that reemployment would be impossible or unreasonable due to a change in the employer's circumstances, or would impose an undue hardship on the employer: PROVIDED FURTHER, That this section shall not apply to a temporary position.

If such person is still qualified to perform the duties of his or her former position, he or she shall be restored to that position or to a position of like seniority, status and pay. If he or she is not so qualified as a result of disability sustained during his or her service in the uniformed services, but is nevertheless qualified to perform the duties of another position, under the control of the same employer, he or she shall be reemployed in such other position: PROVIDED, That such position shall provide him or her with like seniority, status, and pay, or the nearest approximation thereto consistent with the circumstances of the case.

Emphasis supplied.

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And RCW 49.60.180 provides, in part:

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, *honorably discharged veteran or military status*, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, *honorably discharged veteran or military status*, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

Emphasis supplied.

The Washington Law against Discrimination (WLAD), like section 4311 of USERRA, only requires that the service member show that his or her military service was a “motivating factor” in the employer’s adverse employment decision (firing, failure to hire, failure to promote, etc.).² The employer must then articulate a non-discriminatory reason to justify the termination. Whether an employer could successfully justify refusing to reemploy in the context of a National Guard member called up to serve his or her state in a time of domestic emergency is unclear. The WLAD also allows the service-member employee to recover general damages (i.e. pain and suffering/emotional distress) as well as back pay, front pay, negative tax consequences, and attorneys’ fees and costs.

The protections of RCW 73.16.033 would likely apply in the following scenario: Joe Smith has a job in southern Washington. Joe is a member of the *Oregon* Army National Guard and is called to state active duty by the Governor of Oregon. Since the Governor of Oregon is a “competent authority” it is likely that Joe would have the right to reemployment following his return to work in Washington, under RCW 73.16.033.

² It is not necessary to prove that the adverse employment decision was motivated *solely* by the individual’s military service. Human life is not simple, and there is seldom only one reason for a decision.