

## Veterans' Employment Rights 2009: Update on USERRA

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## MILITARY LEAVE BASICS



- Federal USERRA – Uniformed Services Employment and Reemployment Rights Act
- Enacted after Gulf War to encourage reservist activities
- Unpaid Leave, except Texas public employees get 15 days per year paid
- No length of service requirement – brand new employees get reemployment rights
- Voluntary enlistment is protected if not “career” (5+ years)
- Reinstatement to same position, upon honorable discharge and application within 90 days, or up to 2 years if unable because of injury
- Covered for 5 years of leave

## ENFORCEMENT OF USERRA

- **DOL “VETS” Administration (Veterans’ Employment and Training Service)**
  - Written complaint can be electronically filed
  - “VETS investigators are advocates for the law, and the veteran. However, they must remain neutral until the investigation is complete.” –VETS report to Congress
- **No administrative prerequisite – individual can sue employer directly**
- **VETS can refer to US AG (DOJ) for suit**
- **No longer in Office of Special Counsel**

## Statistics

- **VETS/DOL’s Annual Report to Congress on USERRA – FY 2006 (issued 2/08)**
  - Since 9/11/01, have briefed 250,000 reservists on their USERRA rights
  - 2006 issued final regulations
- **2006 Charges:**
  - 33.6% - discrimination
  - 24.3% – failure to reinstatement
  - Remainder benefits, promotion, status, pay rate, accommodation

## No Statute of Limitations?

- **Federal Merit System cases:**
  - No time limitations is “statutory scheme” and will allow indefinite pendency without clear evidence that claimant has abandoned case.
- **D. Mass 2006:**
  - 3-year delay not so unreasonable as to justify applications of laches or undue prejudice to employer.
- **But see *Rogers v. City of San Antonio* (2003 WD TX – r’vrd on other grounds by 5<sup>th</sup> Cir):**
  - Infers 4-year general federal SOL because left out of USERRA
  - VETS suggests that Congress amend USERRA to clarify intent of no SOL

## Burden of Proof

- **2-prong burden shifting**
  - P shows status was a “motivating factor,” and P is done.
  - Employer bears burden to show legitimate reason, *and* that it is not pretext *and* that the action would have been taken “but for” military service.
- **Example: *Smith v. School Bd. Of Polk County, Fla. M.D. Fla. 2002* – Promotion case**
  - P’s evidence of supervisor’s comment that employee “needed to decide if he wanted to be a principal or a soldier” sufficient to shift burden of production and proof
  - Employer wins (rare!) because met “but for” test since employee had not adequately completed the principal program as required

## USERRA Preempts Arbitration Agreements, Contracts, & Civil Service

- **Absolute right to pursue claims judicially cannot be waived**
  - *Breletic v. CACI*, N.D.Ga. 2006;
  - *Lopez v. Dillard's*, D.Kan. 2005
- **Collective Bargaining Agreements/Civil Service rules cannot waive rights**
  - **Intentional discrimination by not allowing make-up promotional exam immediately upon return from military service.** *Fink v. NYC*, E.D.N.Y. 2001; *Brandsasse v. City of Suffolk*, E.D.Va. 1999
  - **Failure to hire because on leave when name came up on police eligibility list is discrimination based on unavailability due to military service.** *McLain v. City of Somerville*, D. Mass 2006
- **Resignation letter cannot waive right to reapply**
  - *Wrigglesworth v. Brumbaugh*, W.D. Mi. 2000

## Failure to state a claim:

- **The military taught me how to identify poor supervision, and “it was because of these abilities that the agency decided to terminate me.”**
  - *Daniels v. USPS 2001*

## Individual liability under USSERA

- City's director of personnel, who had authority over hiring and firing, was subject to liability as an "employer."
  - *Brandsasse v. City of Suffolk, Va.* (E.D. Va. 1999)

## Equivalent Reinstatement / Denial of a "Benefit of Employment"

- Not much leeway at all – Right to restoration of same job and benefits "but for" the protected absence"
- "Escalator Principle"
- Not OK:
  - Sales position to sales trainer position – different commission structure and less stable job. *Maxfield v. Cintas* (8<sup>th</sup> Cir. 2005)
  - Less regular schedule – *Hill v. Michelin* (4<sup>th</sup> Cir. 2001)
  - Extension of attendance improvement plan to continue upon return from military leave precludes MSJ

## **Can't reinstate?**

- **Must show “impossibility” not just undue hardship**
- **Requires bumping – USERRA rights supersede the rights of other employees**
- **Requires looking at other positions**
- **The job must no longer exist and no other jobs exist for which employee is qualified**

## **“At-Will Employment”**

- **No “at will” employment status for 180 days after reinstatement**
- **Employer has burden of proof of non-retaliation for six months**

## Unsettled issues

- **Termination rather than military leave**
  - *Erickson v. US Postal Service – Fed. Cir. Ct. of Apps.*
- **Abandonment of civilian career**
  - *Erickson* – phone call to supervisor: “I prefer my life in the military”
  - *Wrigglesworth* - resignation letter before call-up did not preclude reinstatement claim, because employer told employee that quitting was the proper procedure.

## Bottom line safe practices

- **Reinstate when**
  - Honorable discharge
  - Less than five years out
  - The job still exists even when filled
- **Don't count on statements about career service if under five years**

**Thank you and Good Luck!**

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