RULES ON MILITARY LEAVE UNDER USERRA AND FMLA: THE STORY OF SAMMY SOLDIER AND HIS WIFE, WANDA

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Sammy Soldier applies for a job with TEC. During his interview, Harry HR representative asks Sammy: “Where do you see yourself in 5 years?” Sammy replies, “As a high-ranking officer in the military. I’ve recently applied for the Army. If I get accepted, I may only be here for a short time.” Because Sammy has applied to the Army and may not stay in the job for long, TEC decides NOT to hire Sammy. Does Sammy have a claim against TEC under the Uniformed Services Employment and Reemployment Rights Act (USERRA) for discriminatory failure to hire?

Answer: Yes.

- USERRA's antidiscrimination provision prohibits an employer from denying initial employment, reemployment, retention in employment, promotion, or any other benefit of employment to a person on the basis of membership in a uniformed service, application for membership, performance of service, application for service, or obligation of service. 38 U.S.C. § 4311(a).
- *McLain v. City of Somerville*, 424 F. Supp. 2d 329, 333 (D. Mass. 2006) (mem. & order) (city violated USERRA when it failed to hire serviceman as police officer because his active service in Army made him unavailable until two months after date set for training).

- Because Sammy is such a great candidate, Harry HR representative decides to hire Sammy after all. After successfully performing his job for several months, Sammy is called for active duty. A few weeks before he is scheduled to leave for active duty, Sammy applies for a promotion with TEC. TEC denies him the promotion because it needs someone who can fill the position right away. Does Sammy have a claim against TEC under USERRA for discriminatory failure to promote?

Answer: Yes.

- USERRA's antidiscrimination provision prohibits an employer from denying initial employment, reemployment, retention in employment, promotion, or any other benefit of employment to a person on the basis of membership in a uniformed service, application for membership, performance of service, application for service, or obligation of service. 38 U.S.C. § 4311(a).

- *Tindall v. Dep't of Army*, 84 M.S.P.R. 230, 234-35 (M.S.P.B. 1999) (op. & order) (where employee alleged he was denied promotion because of his current and future military obligation, i.e., his status as member of Army Reserves, employee made claim of discrimination under USERRA).

- *Fink v. City of New York*, 129 F. Supp. 2d 511, 519 (E.D. N.Y. 2001) (mem. & order) (where neutral employment policy provided that promotional exam shall only be administered on particular date to all employees, it may constitute discrimination to refuse to allow veterans away on leave on date in question to take make-up exam upon their return from service).

- After being told he was denied the promotion, Sammy asks Harry HR representative why he was denied the promotion. Harry says: “Well, Sammy, we need someone who can start right away, and you’re about to leave for active duty.” Sammy says, “That’s illegal. I am the best-qualified applicant for the position. I demand that TEC reconsider its decision or else I will sue TEC.” If TEC terminates Sammy’s employment in retaliation for his threat to sue, does he have a claim against TEC under USERRA, even though he has never served in the military?

Answer: Yes.

- Under USERRA, an employer must not retaliate against a person by taking adverse employment action against that person because he or she has taken an action to enforce a protection afforded under USERRA. 38 U.S.C. § 4311(b). This prohibition applies regardless of whether the person has actually performed service in the uniformed services. *Id.*

- *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 619 (E.D. Va. 1999) (op. & order) (police officer's allegations that police department refused to accommodate his taking promotional exam that conflicted with his service in Army Reserve, and began retaliatory and willful investigation calculated to deprive him of an opportunity to be promoted, after he enforced his rights under USERRA, were sufficient to state cause of action for retaliation).

- Sammy takes leave to serve his active duty in Iraq. His wife, Wanda, also works at TEC. Unlike Sammy, who worked a regular 8-5 schedule, Wanda works nights. Since Sammy will no longer be able to care for the kids in the evening, may Wanda take family medical leave to care for the kids while Sammy is in Iraq?

Answer: Probably.

- The FMLA was amended in January 2008 to allow employees to take leave "because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." 29 U.S.C. § 2612(a)(1)(E).

- The secretary of labor has not issued final regulations defining the term "qualifying exigency" (*see id.*), but the regulations are expected to cover situations in which the employee is needed to fulfill family and child-care responsibilities for covered service members who have been called to active duty. *See* 73 F.R. 7876-01 (2008) for notice of proposed rulemaking.

- This new category of leave may be taken intermittently or on a reduced schedule and counts toward the normal 12-week maximum for annual leave or the 26-week maximum in cases in which leave is taken to care for an injured service member. 29 U.S.C. § 2612(a)(3), (4).

- Employers may require employees requesting leave for service-related exigencies to provide certification that the family member is on active duty, although the secretary of labor hasn't yet determined what kind of certification employers may request. *Id.* § 2613(f); *see* 73 F.R. 7876-01 (2008) for notice of proposed rulemaking.

- While Sammy is serving in Iraq, TEC denies him the opportunity to accrue sick leave, vacation leave, and perfect attendance leave. Does Sammy have a claim for discriminatory denial of benefits under USERRA?

Answer: It depends.

- USERRA requires employers, with respect to rights and benefits *not* determined by seniority, to treat employees taking military leave, equally, but not preferentially, in relation to peer employees taking comparable non-military leaves generally provided under the employer's contract, policy, practice, or plan. 38 U.S.C § 4316(b)(1).

- *Rogers v. City of San Antonio*, 392 F.3d 758, 764 n.20 (5th Cir. 2004), *cert. denied*, 545 U.S. 1129 (2005) (employee who is absent for military service is entitled to *non-seniority* benefits commensurate with those due employees taking comparable non-military leaves of absence; if employer has more than one kind of non-military leave and varies level and type of benefits provided according to type of leave used, comparison should be made with employer's most generous form of comparable leave).

- *Lapine v. Town of Wellesley*, 167 F. Supp. 2d 132, 142-43 (D. Mass 2001), *aff'd*, 304 F.3d 90 (1st Cir. 2002) (veteran returning to police position after three-year period of military service was entitled to vacation benefits as if he had been serving in police during period in question, as under circumstances pay was reward for length of service and not short-term compensation for work performed; veteran was not entitled to sick pay benefits as if he had been serving in police during period in question, as under circumstances pay was short-term compensation for work performed, rather than compensation based on length of service).

- Sammy serves in Iraq for 2 years. Upon returning from Iraq, he is diagnosed with post-traumatic stress disorder and does not feel able to work. Sammy's wife, Wanda, works at TEC. Is TEC required to give her family medical leave to care for Sammy?

Answer: Yes.

- The FMLA was amended in January of 2008 to allow a "spouse, son, daughter, parent, or next of kin" to take up to 26 weeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." 29 U.S.C. §§ 2611(16), 2612(a)(3).

- "Serious injury or illness" means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. 5 U.S.C. § 6381(11); 29 U.S.C. § 2611(19).

- "Next of kin" is defined as an individual's "nearest blood relative." 5 U.S.C. § 6381(10); 29 U.S.C. § 2611(18).

- Employers may require certification of the service member's health condition. 29 U.S.C. § 2613.

- The 26 weeks of leave may be taken intermittently or on a reduced schedule. Either way, it must be taken during one 12-month period. The 26-week limit includes any other FMLA leave taken in that period as well. For example, if an employee who is the "next of kin" of an injured service member had already taken six weeks of FMLA leave because of the employee's own serious health condition, she could take up to 20 more weeks of leave related to the service member's disability. 29 U.S.C. § 2612(a)(3), (4).

- After 6 months of treatment for post-traumatic stress disorder, Sammy feels like he is able to work again and notifies TEC that he would like to resume his old job. TEC has long since hired a permanent replacement. Is TEC obligated to accommodate him?

Answer: Generally, yes.

- Any person whose absence from a position of employment is necessitated by reason of service in the uniformed services is entitled to the reemployment rights and benefits of USERRA. 38 U.S.C.§ 4312(a). The returning uniform services member ("reservist") seeking reemployment must make a timely return to or application for reinstatement in the reservist's employment position. *Id.* § 4312(a)(3). The employee reporting back to the employer following a period of less than 31 days must report not later than the beginning of the first full shift on the first full day following the completion of service. *Id.* § 4312(e)(1)(A)(i). If the service period is between 31 and 180 days, the individual must report within 14 days of completion of service. *Id.* § 4312(c). If the service was more than 180 days, the individual must request reemployment no more than 90 days after completion. *Id.* § 4312(e)(1)(D).

- Reporting periods may be extended for two years or more to allow those with injuries incurred in the performance of service a period of recovery. *Id.* § 4312(e)(2).

- A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work. *Id.* § 4312(e)(3).

- After service of 90 days or less, the person is entitled to reinstatement in the position of employment in which he would have been but for the interruption of employment by uniformed service. *Id.* § 4313(a)(1)(A). If the service period was longer than 90 days, the service member is entitled to reemployment in the position of employment in which he would have been but for the interruption of employment by uniformed service, but the employer may also reinstate the member in any position of like seniority status and pay for which he is qualified. *Id.* § 4313(a)(2)(A). If, despite reasonable employer efforts, the service member is unable to qualify for either the position of employment in which he would have been but for the interruption of employment by uniformed service or a comparable position, he is entitled to reemployment in a position that is the nearest approximation the position he would have been in but for the interruption of employment by uniformed service. *Id.* at § 4313(a)(2)(A), (B).

- Exceptions to reemployment include: (1) reemployment impossible or unreasonable because of changed circumstances; and (2) undue hardship. *Id.* § 4312(d)(1). Burden of proof is on employer. *Id.* § 4312(d)(2).

- *Murphree v. Commcn's Techs., Inc.*, 460 F. Supp. 2d 702, 710 (E.D. La. 2006) (order) (military support contractor's hiring of replacement employee on permanent basis after reservist had been called up did not constitute changed circumstances under USERRA).

- TEC agrees to reinstate Sammy in his old job. Is TEC required to give the job to him at the rate of pay and seniority status he would have had had he remained working at TEC during his 2-year absence?

Answer: Yes.

- For rights determined by seniority, USERRA codifies the "escalator principle"—that is, a returning service member does not step back on the "seniority escalator" at the point he stepped off; rather, he returns "at the precise point he would have occupied had he kept his position continuously." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); *see also* 38 U.S.C. § 4313(a); *Rogers v. City of San Antonio*, 392 F.3d 758, 763 (5th Cir. 2004).

- USERRA does not grant "escalator" protection to service members' non-seniority rights and benefits but provides only that the employer treat employees absent because of military service equally with employees having similar seniority, status, and pay who are on comparable non-military leaves of absence under a contract, agreement, policy, practice, or plan in effect at anytime during that uniformed service. 38 U.S.C. § 4316(b)(1).

- Sammy has been back at TEC in his old job for almost a year. TEC is going through a financial crisis and needs to reduce its workforce. Can it lay off Sammy?

Answer: Possibly.

- A person who is reemployed under USERRA shall not be discharged from such employment, except for cause—(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days. 38 U.S.C. § 4316(c).

- Employer can establish "cause" by proving (1) for the conduct in question, the employee had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge; or (2) if, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated or the employee is placed on layoff status. 20 C.F.R. § 1002.248.

- *Ferguson v. Walker*, 397 F. Supp. 2d 964, 973-74 (C.D. Ill. 2005) (discharge of village police officer was due to village's budgetary constraints, and thus, discharge was "for cause" within meaning of USERRA; village faced large deficit in its budget; village's police department expenses had grown significantly since officer was initially hired; since officer's discharge, village had only employed part-time officers, thereby significantly reducing the cost of its police department; and officer was offered the opportunity to take different position and remain employed with the village, but he refused).

- *Duarte v. Agilent Techs., Inc.*, 366 F. Supp. 2d 1039, 1047-48 (D. Colo. 2005) (employer failed to meet burden of establishing that design consultant's termination four months after his reemployment following period of active military deployment was for "cause" within meaning of USERRA; although employer was clearly faced with serious financial hardship in recent years, terminated employee was not given fair opportunity to resume his previous duties before new manager evaluated and ranked him against other employees who were performing like responsibilities).

- *Johnson v. Michigan Claim Service, Inc.*, 471 F. Supp. 2d 967, 973 (D. Minn. 2007) (order) ("cause," for purposes of prohibiting discharge of employee without good cause within one year of return from military deployment, is to be liberally construed and strictly enforced for benefit of those who left private life to serve their country).

- Sammy has been back at TEC in his old job for over a year. His performance is not satisfactory. After providing Sammy with several warnings and counseling sessions and not seeing any improvement, TEC decides to terminate his employment. After Sammy's employment is terminated, he sues TEC for discriminatory termination in violation of USERRA. TEC has an arbitration policy, which Sammy signed and which purports to cover this type of claim. Can TEC force Sammy to arbitrate his claims?

Answer: Yes.

- *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 678 (5th Cir. 2006) (in USERRA case, "[a]n agreement to arbitrate under the FAA is effectively a forum selection clause . . . not a waiver of substantive statutory protections and benefits.").