

FEDERAL LAW PROHIBITS DISCRIMINATION AGAINST CITIZEN-SOLDIERS

On September 20, 2004, the U.S. Department of Labor published draft regulations in the Federal Register to interpret the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). USERRA is intended to minimize the disadvantages to an individual that occur when that person needs to be absent from his or her civilian employment to serve in this country's uniformed services.

In an October 8 press release, Secretary of Labor Elaine L. Chao said the proposed regulations “spell out the rights of our returning service men and women and the responsibilities of employers to honor their service.” As characterized by Secretary Chao, the proposed regulations will “help enforce USERRA” and “ensure job security for the largest group of mobilized National Guard and Reserve service members since World War II.”

To date, more than 420,000 citizen-soldiers have been mobilized since 9/11. This number includes more than 260,000 of those service members who have been demobilized after generally serving for longer tours of duty than occurred during the last comparable conflict, Operation Desert Storm.

USERRA defines the term “uniformed services” as “the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or emergency.” Since National Guard members may perform service under either Federal or State authority, only Federal National Guard service is covered by USERRA.

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. 300hh 11(e)(3), “service in the uniformed services” also includes service performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System, including participation in an authorized training program, even if you are not a member of the uniformed services.

The legislative intent of USERRA is to “ensure that those who serve their country can retain their civilian employment and benefit, and can seek employment free from discrimination because of their service.” In addition to the federal government, USERRA applies to all employers in the public and private sectors, regardless of size.

The anti-discrimination prohibition in USERRA applies to both employers and potential employers. No employer may deny a person initial employment, reemployment, retention in employment, promotion, or any benefit of employment based on the person's membership, application for membership, performance of service, application to perform service, or obligation for service in the uniformed services.

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USERRA applies to all employees, including executive, managerial, or professional employees. Protection under USERRA, however, is limited to employees and does not apply to independent contractors.

USERRA also applies to employment which is temporary, part-time, probationary, or seasonal. An employer, however, is not required to provide reemployment if the position the individual left to serve in the uniformed services was for a brief, non-recurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer, however, would bear the burden of proving that there was no reasonable expectation of continued employment.

The employee is not required to ask for or get the employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of an intent to leave for pending service. Such notice may to the employer may be verbal or written and does not need to follow any particular format. USERRA does not specify how far in advance such notice must be given. Further, the employee is not required to tell the employer of an intent to seek reemployment after completing military service.

The employee is not required to accommodate the employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to provide reemployment because it believes that the timing, frequency or duration of your service is unreasonable. The employer, however, is permitted to bring its concerns over the timing, frequency, or duration of your service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to employers in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

Upon completion of service in the uniformed services, the employee must notify the pre-service employer of an intent to return to the previous employment position by either reporting to work or submitting a timely application for reemployment. In general, the employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employer.

USERRA is administered by the United States Department of Labor, through the Veterans' Employment and Training Service (VETS). VETS provides assistance to those persons experiencing service connected problems with their civilian employment and provides information about the Act to employers.

To find out more about USERRA, visit the Department of Labor website at www.dol.gov/vets or call 1-866-4-USA-DOL.

COACH DEMOTED?

In the case of *Harris v. City of Montgomery*, 322 F. Supp. 2d 1319 (M.D. Ala. 2004) plaintiff Gregory Harris, an employee of the City of Montgomery Parks and Recreation Department, brought this lawsuit against his employer, defendant City of Montgomery, Alabama, and his supervisors, alleging that they discriminated against him on the basis of his membership in the Army Reserve, in violation of the Uniform Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C.A. § 4311. In his complaint, Harris claimed that he was "demoted" from the position of head football coach to that of assistant coach as a result of his military service. The facts of the case were as follows:

Harris is a member of the Army Reserve and is also employed on a 20-hour per week basis for the City of Montgomery Parks and Recreation Department. He has worked for the city since 1996 and has held the position of "Recreation Leader I" since 1999; he was the Bellingrath Junior High School Head Football Coach for the 1999-2000 and the 2000-2001 school years.

In early August 2002, Harris told Athletic Director Williams that he had been called up for annual military training, but that he did not know when he would be required to go. On August 22, 2002, two events took place: first, Harris showed Williams and Bellingrath Community Center Director Green his military orders, which indicated he would have to report for service in September 2002; and, second, Williams told Harris that he would serve as the assistant coach, and another employee would be the head coach.

BENEFIT OF EMPLOYMENT?

As cited by the federal district court, the Uniform Services Employment and Reemployment Rights Act (USERRA) states, in pertinent part:

(a) A person who is a member of ... or has an obligation to perform serve in a uniformed serve shall not be denied ... any *benefit of employment* by an employer on the basis of that membership, performance of service ... or obligation. [Emphasis added.]

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person ... has taken an action to enforce a protection afforded any person under this chapter ... or ... has exercised a right provided for in this chapter." 38 U.S.C.A. § 4311.

As noted by the court, USERRA defines the term "benefit of employment" as "any advantage, profit, privilege, gain, status, [or] account ... that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes ... vacations, and the opportunity to select work hours or location of employment." 38 U.S.C.A. § 4303(2). Moreover, the court found that "courts have construed the term

liberally” in conducting a “fact-specific inquiry” to determine “whether a specific condition, requirement, or term of employment is a benefit of employment.”

The City maintained that Harris did not have a claim under USERRA because he was not denied a “benefit of employment.” In so doing, the City asserted that Harris still held “the same official position of Leader I and his pay had not been reduced.

According to Harris, for all practical purposes, he had been demoted “even though he retained the official position of Leader I.” The federal court agreed. In the opinion of the court, Harris had “submitted sufficient evidence that the change in his position significantly affected his employment status.” In so doing, the court cited Harris’ claim that “the loss of status associated with his removal from the head coach position will limit his ‘coaching career options’ and his ‘advancement opportunities’ because “normally coaches are hired based upon experience and record (achievements).”

Under such circumstances, the court found that “[a] reasonable jury could conclude, after hearing evidence regarding the difference in his duties and status as a head coach and an assistant coach, that he [Harris] was denied a benefit of employment.”

UNLAWFUL MOTIVATION?

As described by the court, to succeed on a USERRA claim, “the plaintiff must prove, by a preponderance of the evidence [i.e., more likely than not] that military service motivated the denial” of a benefit of employment.

An employer shall be considered to have engaged in actions prohibited ... if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service. 38 U.S.C.A. § 4311(c)(1).

In other words, in USERRA actions, the employee must demonstrate that “military status was at least a motivating or substantial factor in the agency action.” To refute such a claim, the employer may show a legitimate reason for agency action, regardless of the plaintiff’s military status. Under such circumstances, the plaintiff may then offer evidence that the employer’s supposed “legitimate” explanation is simply a pretext for discriminatory action based upon military status.

Applying these principles to the facts of the case, the federal district court determined that Harris had “presented evidence from which a reasonable jury could conclude that he was removed from the position of head coach because of his service in the Army Reserve.”

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Harris submitted an affidavit stating that Williams, as Athletic Superintendent of Parks and Recreation, told him that his military status played a "major role" in the decision to remove him from the position of head coach. Jackie Johnson, another employee of the Parks and Recreation Department who was present at the August 22 meeting, corroborated Harris's statement; she submitted an affidavit stating, "Coach Harris asked Mr. Williams what caused this change; Mr. Williams replied that Coach Harris' military training played a role in that decision process."

Furthermore, the court found that discriminatory motive "may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action."

Harris was informed he was not going to be the head coach on the same day he informed Green that he would be called up for duty soon. A jury could infer that, due to the proximity between the time Harris informed his supervisor that he would be away for service and the time the adverse action was taken, Harris's military duties influenced the decision.

In response, the City contended that it had "a legitimate, nondiscriminatory reason for changing Harris's position and that they would have taken the same action regardless of whether Harris was called up for reserve duty." Specifically, the City maintained that Harris was removed from the position of head coach due to a "decrease in participation at Bellingrath." In light of such decreased participation, the City had determined that "students would benefit from having a head coach who was 'on site' and more involved with the students on a day-to-day basis."

According to the City, "Harris worked only 20 hours per week at Bellingrath and was located in another county during the rest of the week." In contrast, the City claimed Harris's replacement was "available at the school on a more regular basis." Under such circumstances, the City maintained that "their decision had nothing to do with Harris's military status."

Under such circumstances, the court found that the City had stated "a legitimate reason to change Harris's position." The court, however, acknowledged the City's legitimate reason might be characterized as a mere pretext for discriminatory action against Harris based upon his military status.

Harris has submitted evidence that defendants' stated reason is not the real reason they removed him. Most importantly, there is evidence that Williams admitted that Harris's military status played a major role in the decision to remove him from the head coach position; this directly contradicts defendants' contention that Harris was removed due to poor student-participation rates. Harris also contends that his replacement was not "on-site" more than he; they both worked 20 hours per week.

As a result, the federal district court found “a genuine issue of material fact remains unresolved regarding defendants' true motivations for their action.” In light of all the evidence, the court therefore concluded that a reasonable juror could find that the City “would not have made the decision to remove Harris but for his military obligations.” Under such circumstances, granting the City’s motion for summary judgment to dismiss Harris’s USERRA claims was unwarranted. The federal district court, therefore, denied the City’s motion for summary judgment, thus providing Harris with an opportunity to present his claims under USERRA for consideration by a jury.