

Veterans are Entitled to More Than Just "Thank You"

The current wars have placed unanticipated burdens on the country's National Guard and Reserve. Most Americans are no doubt thankful for their service. Sadly, though, many service members returning from war are coming home to find their jobs are not what they used be. In some cases, they find themselves demoted or relegated to a back office. In other cases, veterans pick up where they left off on the job, but one-time subordinates are now their supervisors. In the worst case scenarios, there is no job at all, often because the employer hired a replacement.

Appreciation for military service does not translate well to the bottom line. What is fair to the veteran is not necessarily best for the employer.

Statutes intended to protect veterans' employment rights have existed for decades, but in the aftermath of the first Gulf War, the old statutes proved inadequate.

So in 1994, Congress enacted legislation to address veteran–employer conflicts. Under the Uniformed Services Employment and Reemployments Rights Act (USERRA), when veterans' employment rights clash with an employer's interests, the employer's interests must yield. But reality on the ground has made this more difficult.

USERRA provides three major rights: the right to be free from discrimination on the basis of military status, the right to re-employment when employment has been interrupted due to military service and the right to be free from retaliation when exercising USERRA rights.

A uniformed service member may not be denied initial employment, re-employment, retention in employment, promotion or any benefit of employment because of the person's military obligation. But how does someone know he has been turned down for a job because of military status? How does someone know she has been fired because the employer would prefer an employee who won't have to leave periodically for military service?

Conversely, will an employer who wants to discharge a truly awful employee be hamstrung because of the employee's veteran status?

USERRA gives the veteran some advantages that plaintiffs claiming racial or gender-based discrimination don't enjoy. To establish their initial burden in a USERRA discrimination case, veterans need to show that their status as a service member was a motivating factor, not the motivating factor, in the action taken by the employer.

Military status is considered a motivating factor if the employer conditioned a decision on that fact.

Direct evidence of discrimination can be hard to come by, but often employers disparage the employee's obligation to perform military service or make comments like "if you hadn't spent all that time in the military you would have been promoted by now."

Sometimes, employers hassle their serving employees, trying to get them to perform civilian job tasks while they are on military duty, especially when the employee is on short-term duty such as a two-week training exercise.

Typically, employees cannot mesh the demands of their employer with their military obligations. Often, this leads to adverse employment action against the returning veteran employee, in some cases termination.

I was involved in a case where an employee was fired while on military duty. The employer sent a supervisor to the employee's National Guard unit to serve him with a termination letter. The guard unit would have none of this, so the employer simply sent an e-mail letting the employee know that his presence on the job was no longer required.

If a veteran can show that military status was a motivating factor in the action taken by the employer, then the burden shifts to the employer. If the employer can establish that military service had nothing to do with the action taken against the employee, the employer prevails. In a "dual motive" case, the employer, although conceding that military service played an improper part in the employer's action, seeks to establish that the same action would have been taken regardless of military service.

For example, a veteran is fired because the boss does not like the fact that he takes time off for military training and because the employee is chronically late to work. If the employer can show that the employee would have been fired for being late, even if the employee had no obligation to perform military service, there is no liability on the part of the employer.

These types of cases are the most perplexing to veterans: Prohibited discrimination has been established, but there is no remedy. To veterans who find themselves in this situation, typically without a job, the supposed "liberal construction" of USERRA in their favor is a cruel illusion.