

2nd Cir. OKs Termination Notice Given to Iraq Vet 3 Days into Reemployment

By Mathew B. Tully

In a ruling

that could embolden employers eager to shed employees who have been repeatedly called to military service, the 2nd

Circuit Court of Appeals on May 31 said a Connecticut dental group did not violate the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it notified an Army reservist three days after he returned to work following a tour in Iraq of its intention to terminate his job in the near future.

The case, *Hart v. Family Dental Group, PC, Epstein*

, involved Evan Hart, a dentist who was hired to work for Family Dental Group in 2001. He was also an Army reservist who was twice deployed during his tenure at the dental group. Hart's first deployment sent him to military bases in North Carolina and Texas for six months in 2003 and his second deployment in 2004 sent him to Iraq from September to December.

Case basics

On Jan. 20, 2005 – three days after Hart recommenced working for Family Dental Group – the company's president, Kenneth Epstein, notified the dentist he would be terminated in 60 days. Epstein reduced this period to 30 days after Hart questioned his termination's legality. The 30-day period was later extended to 180 days after the U.S. Department of Labor notified the dental group that under USERRA Hart would have to be reemployed for at least 180 days.

Hart stopped working with Family Dental Group on July 20, 2005. He later sued Family Dental Group and Epstein, alleging eight counts of USERRA violations relating to discrimination protections and reemployment rights. The district court granted judgment in favor of Family Dental Group on seven counts and a jury decided in favor of the dental group on the last count. Hart appealed the district court's judgment on his entitlement to reemployment rights count. The 2nd

Circuit upheld the lower court's ruling and added that the employer's 60-day termination notice, which was subsequently reduced to 30 days and extended to 180 days, did not violate USERRA.

What service members need to know

USERRA's reemployment rights apply to service members, so long as they satisfy five

conditions. These USERRA conditions include: 1. the employment absence was necessitated by uniformed service; 2. proper notification of uniformed service obligations was given to the employer; 3. the period of uniformed service did not exceed certain time limits (usually five years); 4. a good-standing discharge from service was received; and 5. the timely submission of a reemployment application. (38 U.S.C. 4312(a)).

USERRA requires employers to retain reemployed service members for up to one year if their period of service before the reemployment was more than 180 days. In cases when the period of service before the reemployment was less than 180 days, the employer must retain the reemployed service members for up to 180 days. A cause for discharge, however, could override these mandates (38 U.S.C. 4316(c)).

USERRA prohibits employers from denying initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of a person's military membership, obligation, or performance of service (38 U.S.C. §4311(a)).

USERRA entitles reemployed service members to the seniority and seniority-based rights and benefits they would have received had their military duty not interrupted their civilian employment (38 U.S.C. §4316(a)).

Hart focused his appeal on Section 4312 of USERRA, which only addresses a service member's immediate reemployment rights. The court noted Hart "was provided additional protections under USERRA."

Hart did not appeal his claims under Section 4311's anti-discrimination provisions or Section 4316's rights to seniority and seniority-based benefits, and the court declined to weigh in on their merit.

As this case highlights, getting reemployment is just half of the battle service members must often fight when they leave active duty and attempt to reenter the civilian workforce. Service members need to aggressively assert all of their USERRA rights – not just those that pertain to their immediate reemployment – to ensure job security and peace of mind. Service members experiencing difficulties returning to work or receiving employment benefits should contact a military law attorney.

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