TULLY RINCKEY PLLC
YOUR LAWYERS FOR LIFE - 1888LAW4LIFE.COM

You Must Apply for Reemployment

Sergeant Major (SGM) Richard Erickson, ARNG, won an important partial victory in this recent case decided by the United States Court of Appeals for the Federal Circuit. He might well have won a complete victory if he had applied for reemployment within 90 days after he left active duty on Dec. 31, 2005. Let this case serve as a lesson—you must dot the i's and cross the t's if you expect to exercise your right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and that includes applying for reemployment, even if you believe that your employer will reject your application.

I initiated the Law Review column in ROA's magazine and website in 1997. I invite your attention to www.roa.org/law review

. You will find more than 500 articles, mostly by me and mostly about USERRA and related laws. You will find a detailed Subject Index, to help you find articles about very specific USERRA topics. I suggest that you start with Law Review 0766 (Dec. 2007), entitled "USERRA: A Primer."

As I explained in Law Review 0766 and many other articles, there are five conditions that you must meet to have the right to reemployment after a period of service in the uniformed services. Section 4303(13) of USERRA [38 U.S.C. 4303(13)] defines the term "service in the uniformed services" very broadly—it includes active duty, active duty for training, inactive duty training (drills), initial active duty training, and funeral honors duty. The definition also includes a period of time when you are away from your civilian job for purposes of an examination to determine your fitness to perform any such duty. A period of uniformed service can be anything from five hours to five years, and in some cases substantially longer.

To have the right to reemployment, you must meet these conditions:

Must have left a position of civilian employment for the purpose of performing uniformed service, voluntary or involuntary.

Must have given the employer prior oral or written notice.

Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 for a detailed review of what counts and what does not count.

Must have been released from the period of service without having received a punitive or other-than-honorable discharge.

Must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

After a period of service of more than 180 days, you must apply for reemployment within 90

days. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. If you are hospitalized or convalescing from an injury or illness incurred or aggravated during the period of service, your deadline to apply for reemployment can be extended by the period of convalescence, for up to two years. 38 U.S.C. 4312(e)(2)(A).

The right to reemployment after a period of service comes from section 4312 of USERRA, 38 U.S.C. 4312. Section 4311 makes it unlawful for an employer to deny an individual initial employment, retention in employment, promotion, or a benefit of employment because of the individual's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service. A clear distinction must be drawn between section 4311 cases and section 4312 cases. In the Erickson case, much confusion and fuzzy thinking resulted from the failure of the employer's personnel office and legal department and the Merit Systems Protection Board (MSPB) to understand this critical distinction.

SGM Erickson was employed by the United States Postal Service (USPS) from 1988 until he was removed from his position in 2000. He served in the Army National Guard (ARNG) and the United States Army Reserve (USAR) during the entire time he was employed by the USPS, and also before and after his USPS employment. Between 1991 and 1995, he was away from his USPS job for military service for a total of 22 months, and between 1996 and his removal in 2000, he worked at the USPS for only four days, being on military duty the rest of the time.

Although SGM Erickson had been away from his civilian job for military service for more than 60 months (five years) cumulatively, he had not exceeded the five-year limit as of the time that he was fired by the USPS in 2000. Section 4312(c) of USERRA sets forth eight exemptions from the five-year limit—kinds of service that do not count toward the limit. Much of the service that SGM Erickson had performed was exempt from the five-year limit, and the part that was not exempt did not add up to five years. In January 2000, a USPS labor relations specialist contacted SGM Erickson by telephone at the military base where he was serving on active duty and asked him whether he intended to continue serving in the military or whether he intended to return to his USPS employment. He responded, saying that he would not report back to the USPS until he completed his current tour of duty, in September 2001. In the course of the conversation, he also stated that he preferred military service to working for the USPS.

The USPS then issued a notice proposing to remove SGM Erickson from his USPS position because of "excessive use of military leave." He did not respond to the notice, and the USPS removed him from USPS employment on March 31, 2000. He had a clean work record with the USPS. The only "misconduct" justifying his dismissal was his absence from work to serve our nation in uniform.

SGM Erickson had not exceeded the five-year limit as of March 31, 2000, when the USPS terminated his employment, but that is beside the point. The five-year limit is an eligibility criterion for reemployment—serving beyond the five-year limit must not be characterized as misconduct by any employer, especially a federal agency. On March 31, 2000, SGM Erickson was still on active duty, and he had not applied for reemployment. Unless and until the servicemember applies for reemployment, no determination should be made as to whether he or she meets the eligibility criteria, including the five-year limit.

SGM Erickson's active duty tour expired in September 2001, the same month as the terrorist attacks on our country. Because of the national emergency, and also because he was aware that the USPS had terminated his employment, he remained on active duty until Dec. 31, 2005. For reasons that are not clear, he did not apply for reemployment with the USPS within 90 days after the date of his release from active duty, as required by 38 U.S.C. 4312(e)(1)(D).

On Sept. 28, 2006 (almost nine months after he was released from active duty), SGM Erickson filed an appeal with the MSPB, alleging that the USPS violated section 4311 of USERRA when it terminated his employment on March 31, 2000, and also alleging that the MSPB violated section 4312 when it denied him reemployment after he was released from active duty on Dec. 31, 2005 (two separate alleged violations). The MSPB is a quasi-judicial federal agency consisting of three members, each of whom is appointed by the President with Senate confirmation. The MSPB decides disputes between federal agencies (as employers) and federal employees under many laws, including USERRA.

MSPB cases are initially tried before an Administrative Judge (AJ) of the MSPB, and the losing party can appeal to the MSPB itself. MSPB decisions can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits here in our nation's capital. The Federal Circuit has nationwide jurisdiction, but only as to certain kinds of cases, including appeals from MSPB decisions. I invite the reader's attention to Law Review 189 (Sept. 2005), entitled "Appellate Review of MSPB Decisions on USERRA."

After a trial, the MSPB AJ held that the USPS had violated section 4311 by terminating SGM Erickson's employment in March 2000 because of his service in the uniformed services, but the AJ also held that SGM Erickson had "abandoned" his USPS career in favor of a military career. Thus, the AJ issued an initial decision denying SGM Erickson's appeal.

The AJ's decision is an example of fuzzy thinking. SGM Erickson's subjective "abandonment" of his civilian job for military service is irrelevant. If and when the recently separated veteran applies for reemployment, after release from a period of service, he or she is entitled to reemployment if he or she meets the five eligibility criteria, regardless of his or her intent about returning to work at the time of departure or during the period of service. In this case, SGM Erickson did not apply for reemployment in 2000—he remained on active duty until Dec. 31, 2005.

The point of the reemployment statute is to maintain the servicemember's right to return to the civilian job as an unburned bridge. If the individual meets the eligibility criteria after release from the period of service, he or she is entitled to reemployment, regardless of what he or she may have intended, or said, or done before or during the period of service. See Leonard v. United Air Lines, Inc. , 972 F.2d 155 (7th Cir. 1992). I discuss Leonard and its implications in detail in Law Review 0857 (Nov. 2008).

SGM Erickson filed a petition for review by the full MSPB. The MSPB adopted the AJ's result but not all of the reasoning. The MSPB decision did not address the question of whether SGM Erickson had "abandoned" his civilian career for a military career. Rather, the MSPB found, contrary to the AJ, that the USPS did not violate section 4311 because the March 31, 2000 termination was motivated by SGM Erickson's absence from work and not by his uniformed service.

On appeal, the Federal Circuit forcefully rejected this nonsensical distinction: "We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of absence when that absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA."

The Federal Circuit held that the USPS violated section 4311 when it terminated SGM Erickson's employment on March 31, 2000. That is a separate issue from the question of whether the USPS violated section 4312 when it denied him reemployment in 2006. It should be emphasized that there is an important distinction between firing SGM Erickson and

denying him reemployment.

SGM Erickson had not exceeded the five-year limit prior to March 31, 2000, because much of the service that he had performed was excluded from the computation of the limit. It is unclear whether he exceeded the limit sometime between March 31, 2000 and Dec. 31, 2005, when he finally left active duty.

If SGM Erickson was beyond the five-year limit by Dec. 31, 2005, he would not have had the right to reemployment with the USPS. Nonetheless, he could have applied to the USPS or another federal agency for initial employment, and he likely would have been hired. As it is, it is most unlikely that SGM Erickson will be hired by any federal agency, or even by a state or local government or private employer. The official record shows that he was fired for misconduct on March 31, 2000, although the misconduct consisted solely of serving in our nation's armed forces and thereby inconveniencing his civilian employer. It is unconscionable that the USPS and the MSPB consider military service to amount to misconduct in a federal civilian job.

In its final decision, the MSPB found that SGM Erickson's cumulative military service had exceeded the five-year limit before Dec. 31, 2005, when he finally left active duty. SGM Erickson appealed this point to the Federal Circuit, contending that his continued active duty after Sept. 2001 should not count because it was for the purpose of mitigating the damages caused by the unlawful dismissal on March 31, 2000.

In its USERRA Regulations, the Department of Labor has taken the position that "Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her" is to be excluded from the computation of the individual's five-year limit. 20 C.F.R. 1002.103(b). I also invite the reader's attention to Law Review 190 (Sept. 2005), entitled "Active Duty To Mitigate Damages Does Not Count Toward Five-Year Limit."

Unfortunately, the Federal Circuit found that it did not need to reach the question of whether SGM Erickson was within the five-year limit because he failed to meet one of the other eligibility criteria:

"Because Mr. Erickson completed his military service on December 31, 2005, he was required to submit an application for reemployment with the agency [USPS] by April 1, 2006, but there is no evidence that he did so. Although he suggested in a deposition that he had asked an agency official for his job back shortly after his removal, he conceded at oral argument that he had merely 'expressed a concern' that he was unlawfully removed in violation of USERRA and that he did not affirmatively request to be reemployed by the agency. Similarly, while Mr. Erickson states that he was in frequent contact with his union regarding alleged violations of his USERRA rights (both before and after his removal), he has not provided any evidence that the union sought his reemployment with the agency. An application for reemployment under section 4312 requires more than 'a mere inquiry.' McGuire v. United Parcel Service, 152 F.3d 673, 676 (7th Cir. 1998), and Mr. Erickson's actions were insufficient to constitute requests for reemployment under the statute."

I invite the reader's attention to the attachment to Law Review 77 on the ROA Law Review website. This is a sample application for reemployment letter. I strongly suggest that you apply for reemployment in writing and use this attachment as a template.

After the terrorist attacks of Sept. 11, 2001, SGM Erickson deployed to Afghanistan, where he was wounded in action and received a Purple Heart. He argued, through his attorneys, that his combat wound entitled him to a two-year extension on the deadline to apply for reemployment, under 38 U.S.C. 4312(e)(2)(A). The Federal Circuit rejected this argument because there was no evidence that SGM Erickson was "hospitalized or convalescing" from the wound after he was released from active duty on Dec. 31, 2005.

SGM Erickson has won an important partial victory, and the court decision contains some excellent language that is likely to be most helpful in future cases. He might have won a complete victory, if only he had applied for reemployment within 90 days after Dec. 31, 2005. Unfortunately, he did not seek legal advice during that time period, and when he did seek advice the 90-day deadline had already passed.

The Federal Circuit remanded the case to the MSPB, to fashion an appropriate remedy for the unlawful firing of SGM Erickson on March 31, 2000. We will keep the readers informed of developments in this important case.

For more than 27 years, I have been urging National Guard and Reserve personnel to “dot the i’s and cross the t’s” when dealing with their civilian employers on matters of this kind. As of June 2009, I am at ROA full-time, as the first Director of the Servicemembers’ Law Center. Call me tollfree at 800-809-9448, ext. 730, or e-mail me at SWright@roa.org. Please contact me before you allow an important deadline to pass.