



Posted on Sat, May. 09, 2009

## **Returning reservists find military duty clashes with job protection**

By SCOTT CANON

Russell Hogan enlisted in the Air Force Reserve as a high school senior in 1988. Four years later he went to work for United Parcel Service.

Eleven years after that, the United States invaded Iraq. Hogan and hundreds of thousands in the National Guard and Reserve went into uniform and off to war.

He returned to civilian life the next year, but not to his old job driving a tractor-trailer truck out of a UPS outpost in Sedalia. That job had disappeared.

Hogan sued.

His case is scheduled for trial next month, joining thousands of other disputes across the country over a federal law that protects workers against losing their jobs because they answered the call to military service.

“This is a law that everybody supports, but you’ve got to achieve a balance,” said Tim Davis, the managing director of the Constangy Brooks & Smith labor and employment law firm in Kansas City. “It’s a job protection, but it’s not a job guarantee.”

As so many Americans have toggled between military service and civilian work through the Afghan and Iraq wars, the strain on them and their employers has tested the laws meant to make sure they can double as workers and troops.

Veterans groups complain that some employers are quietly shying away from workers who might get called to active duty out of fear of the cost and inconvenience of making do during deployments.

At the same time, employers are faced with holding spots for workers who can be shipped overseas repeatedly and gone for up to two years at a stretch.

“That’s the cost of war. America believes if we’re going to deploy these men and women to protect their country, we should at least take care of them when they get back,” said Justin Brown, a Washington lobbyist for the Veterans of Foreign Wars. “That can be hard for some employers. Some step up. Others don’t.”

Ray Shouse was the title examination manager for Missouri for Chicago Title Co. when he was called to active duty in the Army Reserve early in the Iraq war. While he was off managing water purification on American bases in Iraq, the company had another manager oversee Kansas and Missouri operations. Shortly after Shouse got back, he was promoted in charge of the Houston operations — a much larger market.

“It was a challenge, but the rest of the team stepped up and covered for him,” said Tom Dulick, the vice president for the company’s Kansas City office. “We’re just fantastically happy he got back safe.”

#### On/off duty

The re-entry to the civilian workplace is anything but uniformly smooth. The Department of Labor found that in 2008 more than 1,400 workers filed complaints alleging they were not fairly returned to their jobs.

Since Sept. 11, 2001, more than 670,000 men and women have been called to active duty. More than 1 million civilian workers have reserve obligations. Ted Daywalt, the president of the VetJobs online employment service, said it had gotten harder for businesses as the Pentagon increased the length of deployments.

“It’s hard to run a company when your employees are being taken away for two years,” he said. “Most companies are pro-military. It used to be that people were only called up for 30 or 60 days after World War II and Korea.”

But this decade the call-ups for Iraq and Afghanistan are longer and repeated.

A survey by the Society for Human Resource Management last year found 44 percent of employers had workers gone for active military duty and more than half said that put an added burden on their remaining workforce.

Nearly nine out of 10 did not even know when their deployed workers would return.

The Employer Support of the Guard and Reserve, a Defense Department agency, said that last year it fielded more than 10,000 calls from workers and employers confused about the law. Of those, 2,600 went to mediation at the agency. And of those, 780 were left unresolved.

How many have trouble retaining their private sector jobs is less clear, although one law firm that specializes in the cases filed 2,500 last year.

Under the 1994 Uniformed Services Employment and Reemployment Rights Act, or USERRA, people called to active military duty are promised the same work they would have had if they never went to war.

That means if they were due for a raise, they return to a higher wage. Seniority accrues even while they are gone. So if a promotion is based on how long they've worked for a company, they may return to an immediate promotion — even if that means demoting a worker who leap-frogged in their absence.

Also, if pay cuts were imposed on a worker's peers, that returning sergeant or colonel would return to a smaller paycheck. Those who would have been laid off had they not been called to active duty would find their jobs gone upon return.

## Hogan vs. UPS

Russell Hogan's case shows how those rules can sometimes be hard to read.

Two tractor-trailer drivers were working the same "feeder" route out of Sedalia in 2003 — Hogan and one of his union brethren with more seniority — when the Air Force called him to service the A-10 jets giving air support for ground troops in Iraq.

The shipping company said it eliminated one of those two routes during Hogan's deployment to increase efficiency. The remaining route went to the worker with seniority.

In court papers filed on his behalf by the U.S. attorney's office — the government backs a few dozen veterans a year in such claims — Hogan contends the one route was eliminated not for efficiency reasons but because of his absence. That figures to be a key question in the case.

UPS offered him other work. He could earn about half his old wages as a package handler in Sedalia. He could also drive a delivery truck — work typically a stepping stone to the type of job he had before.

Or instead of commuting the 26 miles from his home in Otterville, Mo., to Sedalia, he could go back to driving another feeder route. But that would mean a daily commute of 100 miles each way to a UPS facility in Lenexa.

Hogan grudgingly worked the Lenexa job for a little over a year until the Air Force called him to active duty again. In October 2005, he quit UPS and two and a half years later, convinced of the merits of his grievance, the U.S. attorney's office filed his lawsuit.

Hogan declined to talk about the case amid the pre-trial legal motions.

UPS said it was eager to support workers who served in the military, but it also needed flexibility to run its shipping business efficiently.

Hogan's hopes of getting a UPS route in Columbia — a longer commute than Sedalia but not nearly as distant as Lenexa — were stymied because other drivers there had

seniority over him. UPS insists it couldn't violate its contract with Teamsters Local 41 to accommodate Hogan.

"Not only did we follow (the law), but certainly we have given Mr. Hogan other employment," said Susan Rosenberg, a UPS spokeswoman in Atlanta.

Big law, little teeth?

Some federal appeals courts have ruled that pre-employment contracts can essentially overrule the USERRA rules.

Marine reservist Michael Garrett was called to duty in 2003 while working at Circuit City in Texas. He contended he was ultimately fired because of his obligations to the Marine Corps. But Circuit City argued that an arbitration agreement, which was a tacit agreement of employment at the store, barred him from suing. The employer won.

A bill pending in the U.S. Senate would require that the federal law trumps arbitration clauses, union contracts and state regulations.

"In 2002 and 2004, the cases came up because people didn't understand the law," said Mathew Tully, whose law offices in Washington, D.C., and New York specialize in USERRA cases. "Now you see employers trying to get around the law."

Tully thinks the law isn't strong enough and that employers are calculating that the risk of losing a case is not daunting enough to change their behavior. An employer found to have stiffed a returning veteran is only liable for lawyers' fees and three times the difference between what that worker would have earned and what they ultimately earned.

"They're making business decisions noticing that Johnny Jones is going on military leave every other year," he said. "They're thinking: 'There's no end in sight in Afghanistan. There's no end in sight in Iraq. So we've got to deal with this.' "