LAW REVIEW 740

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CATEGORY: USERRA—Enforcement
USERRA—Seniority: Federal Employees Protected from RIF during Military Service

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Q: I am a federal employee, currently on military leave. I was mobilized, and I am in Iraq. The federal agency where I work is being downsized, and many employees are being dismissed under a Reduction in Force (RIF). If I were there, instead of in Iraq, I would almost certainly be included in the RIF. Am I exempt from the RIF while I am on active duty?

A: Yes, in accordance with title 5, Code of Federal Regulations (CFR), section 353.209(a): "An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered 'for cause' under this subpart.) He or she is not a 'competing employee' under 351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status and pay" 5 CFR 353.209(a)).

The first section of the Uniformed Services Employment and Reemployment Rights Act (USERRA) expresses the "sense of Congress that the federal government should be a model employer in carrying out the provisions of this chapter" 38 U.S.C. 4301(b)). This provision, exempting a federal employee from a RIF during the time he or she is away from work to perform uniformed service, is an example of the federal government doing more for its employees than it requires of employers generally.

This provision only applies to the federal government as an employer. An employee of state or local government or a private employer is not exempt during his or her service from a RIF or layoff that *clearly would have happened anyway* even if the person had not been on active duty at the time, unless there is a state law or regulation or a local ordinance that provides protections similar to those provided by 5 CFR 353.209(a).

In its first case construing the reemployment statute, the Supreme Court enunciated the "escalator principle" when it held, "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war" *Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 284-85 (1946)). It has always been true that the "escalator" can descend as well as ascend, and indeed Fishgold was a case about a descending escalator. After World War II ended, the need for the services of the Sullivan Drydock & Repair Corp. sharply declined, and hundreds of employees were laid off. It appeared that Mr. Fishgold would have been affected by the layoff even if he had not left his job to serve in the Army.

In 1946, when the Supreme Court enunciated the escalator principle, more than half of all private-sector employees were represented by labor organizations; today the figure is less than 8 percent. In the absence of a union and a collective bargaining agreement, layoffs and RIFs are often not governed by seniority. The lack of a system of seniority makes it much more difficult to determine what would have happened to a Reservist at her or his civilian job absence of activation.

I hear all the time from Reserve and National Guard members returning from mobilization to find themselves unemployed because the employer contends "we abolished your job while you were in Iraq." In this situation, where only a small percentage of the employees have been dismissed or laid off and where layoffs are not based on seniority, the burden of proof should be on the employer to show that the job was abolished for reasons unrelated to the military service and that the Reservist would have been laid off regardless. Otherwise, the employer can make a mockery of USERRA's protections by the clever device of the phony reorganization.