LAW REVIEW 1098

Paid Military Leave for National Guard Technicians

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Q: I am the Property and Fiscal Officer for the National Guard of a state. I am responsible for the proper expenditure of and accounting for federal funds and federal property for this state's National Guard. We had a National Guard technician (Captain) in this state. Almost five years ago, she left her technician job here to go on full-time Active Guard and Reserve (AGR) duty. Her AGR orders have been extended more than once, and she has since switched her National Guard membership to another state, in order to remain on AGR duty.

We have been paying her paid military leave each year, in accordance with section 6323 of title 5 (5 U.S.C. 6323). Each October 1 (the start of the new federal fiscal year), we put her back on the payroll until her paid military leave is exhausted. Because we only charge her for work days, this gives her one full pay period of civilian pay and about half of a second pay period. We are contemplating discontinuation of her paid military leave after she passes the fifth anniversary of her departure from her technician job for the purpose of going on AGR duty. Would that be lawful?

A: Probably so, but the matter is not entirely free from doubt. It seems to me that this is a question under 5 U.S.C. 6323, not under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The pertinent language of section 6323 is as follows: "Subject to paragraph 2 of this subsection [pertaining to part-time employees and not pertinent to this discussion], an *employee* as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for *active duty,* inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year." 5 U.S.C. 6323(a)(1) (emphasis supplied).

Congress has explicitly included *active duty* among the kinds of military duty for which an individual is to receive paid military leave under section 6323. Thus, it is clear that an individual who has left federal civilian employment for active duty remains an employee and remains eligible for the 15 days of paid military leave per fiscal year. But for how long? Section 6323 does not answer this question, and I have not found anything in the legislative history of that section that sheds any light on this question.

Section 6323(a)(1) refers to "an employee as defined by section 2105 of this title." I have read and reread that section, and it says nothing about the question of when (if ever) a person who has left a federal civilian position of employment for full-time military duty ceases to be an "employee" who is entitled to paid military leave under section 6323.

Faced with this question, federal agencies generally refer to section 4312(c) of USERRA, which establishes a five-year limit on the duration of the period or periods of uniformed service that an individual can perform, with respect to the employer relationship for which the individual seeks reemployment, and still have the right to reemployment under USERRA. Section 4312(c) also establishes eight exemptions from the five-year limit—kinds of service that do not count toward exhausting the limit. The shorthand version is that *all* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit.

Please see Law Review 201 for a definitive discussion of what counts and what does not count toward exhausting the five-year limit. You can find more than 750 "Law Review" articles at www.roa.org/law_review. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

In any case, I do not believe that USERRA's five-year limit is necessarily relevant to the determination of how long a federal employee who is away from work for long-term active duty continues to be entitled to *paid* military leave under section 6323. Section 6323 and USERRA are in different titles of the United States Code, were enacted at different times, and apply to different employers. USERRA applies to essentially all employers, including the Federal Government. Section 6323 only applies to federal employers, and for purposes of this section the National Guard technicians are considered to be federal employees.

We do not know how much of the five-year limit this particular National Guard officer has utilized. It may be that some or most of her recent military duty has been exempt from the five-year limit, under one or more of the subsections of section 4312(c) of USERRA. The determination about the five-year limit and the other USERRA eligibility criteria can only be made if and when she leaves active duty and applies for reemployment. At this point, it seems most unlikely but not totally inconceivable that she will ever apply for and be entitled to reemployment as a National Guard technician in your state.

Q: A supervisor in our personnel office has suggested that we terminate this officer's technician employment, in order to justify cutting off her paid military leave and to make clear that she will not have the right to reemployment as a technician in this state. What do you think?

A: I think that is a terrible idea for several reasons, including the terrible appearance. How do we get private employers and local governments to comply with USERRA if the word gets out that the state's National Guard has terminated a civilian employee for going on active duty?

Termination of employment clearly implies misconduct. Leaving one's civilian job for military service and remaining on active duty past the exhaustion of the five-year limit *is not misconduct.* The five-year limit is an eligibility criterion for reemployment. This officer will leave full-time AGR duty at some point, perhaps at retirement. If she has exceeded the five-year limit (including the generous exemptions from the limit), or if she fails to meet one or more of the other eligibility criteria, she will not have the right to reemployment, but she could certainly apply for another federal civilian position. If her personnel record shows that her former federal civilian employment was *terminated,* it will be most difficult for her to find other federal civilian employment. Please see Law Review 1028 (by Ariel Solomon, Esq.), concerning the case of *Erickson v. United States Postal Service,* 571 F.3d 1364 (Fed. Cir. 2009).

It is absolutely unacceptable for any federal agency (and especially the National Guard) to *terminate* an individual's employment relationship because of military service, even service beyond the five-year limit. We cannot countenance treating military service as *misconduct* in a civilian job.