

Surgeon Not Entitled to USERRA Reinstatement When Employed for Brief Period, Court Finds

By M. Christopher Moon

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An employer did not violate the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) when it discharged an employee shortly after his return from active duty, the Sixth Circuit Court of Appeals, in Cincinnati, has held. *Slusher v. Shelbyville Hosp. Corp.*, No. 15-5256 (6th Cir. Oct. 26, 2015).

The Court found the employee was not covered by USERRA because his employment was for a brief period and he would not have had a reasonable expectation that his employment would continue for a significant period. The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

The Facts

Richard Slusher, an orthopedic surgeon and military reservist, began a 30-day assignment working for Shelbyville Hospital Corporation d/b/a Heritage Medical Center (“Heritage”) in July 2010, and that assignment was extended several times. At the time, Heritage, a small hospital with need for only one permanent orthopedic surgeon, wanted to hire someone on a full-time basis. Heritage offered Slusher the full-time position in 2010, which he rejected “to keep [his] options open.”

Eventually, Slusher agreed to work at Heritage on a short-term basis, signing a one-year contract in January 2011 that could be terminated by either party with 90 days’ notice and could be terminated by Heritage immediately with 90 days’ pay. Heritage was aware when Slusher signed the contract that he could be called up for deployment at any time.

Meanwhile, Heritage remained interested in finding a permanent orthopedic surgeon. In April 2011, Heritage spoke with another surgeon about the permanent position. The next month, Slusher received military deployment orders. Approximately two weeks later, Heritage entered into a “recruitment agreement” with the other surgeon setting forth terms of employment, with an anticipated start date in August 2011.

Heritage granted Slusher military leave and he reported for active duty in June 2011; ultimately, he was deployed to Iraq.

Heritage sent Slusher a termination agreement while he was in Iraq. The agreement stated his employment with Heritage would end on October 26, 2011. Slusher signed the termination agreement and, after returning from Iraq early in October, continued working at Heritage until October 26.

Slusher later filed a lawsuit claiming violations of the reemployment and discrimination provisions of USERRA. The district court granted summary judgment to the defendants (Heritage and its Chief Executive Officer), finding that Slusher did not enjoy statutory entitlement to reemployment and was not a victim of discrimination.

Not Entitled to Reemployment

The federal appeals court affirmed the lower court’s grant of summary judgment, concluding Slusher was not entitled to reemployment under USERRA.

Under Section 4312 of USERRA, individuals whose absence from employment is due to service in uniformed services typically are entitled to reemployment. However, no statutory right to reemployment exists if the employment from which the person leaves “is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.” 38 U.S.C. § 4312(d)(1)(C).

Here, the Court ruled that Slusher could not reasonably expect that his employment would continue indefinitely or for a significant period. Slusher knew that Heritage was seeking a permanent orthopedic surgeon when he informed Heritage of his need for leave. Indeed, he previously had rejected the position. In the Court’s view, Slusher essentially had a temporary job that was to end as soon as a suitable

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replacement could be secured. Moreover, the Court found the employment from which Slusher left was “brief.” Although the Court declined to rule that a one-year employment term was categorically brief, it held Slusher’s employment term was brief because the parties’ understanding was that it would last up to one year, but most likely less.

The Court also affirmed the grant of summary judgment on Slusher’s discrimination claim. It primarily relied upon the “strong, uncontroverted” evidence that Heritage was looking for a permanent orthopedic surgeon before it knew of Slusher’s deployment. Thus, there was no genuine dispute as to whether his protected military status was a substantial or motivating factor in the hospital’s actions. (The Court also affirmed the grant of summary judgment on a breach of contract claim that did not involve USERRA.)

Implications for Employers

This case offers guidance on how to handle USERRA issues raised by short-term employees. Employers should consider taking at least three steps to reduce exposure to USERRA reemployment and discrimination claims.

First, employers should document internally the anticipated timeframe of any short-term employment. While employment contracts may not be necessary for most at-will employees, it is useful to document the expected length of any projects.

Second, employers should communicate clearly with short-term employees about the anticipated length of employment, so that no reasonable basis exists to believe employment will continue beyond a specific project or length of time.

Third, employers should document the rationale for any adverse employment actions, including when decisions were first considered. In this case, Heritage successfully defended against USERRA claims in large part because it could show plans to fill the position permanently that pre-dated knowledge of Slusher’s deployment and that Slusher had rejected the permanent position.

Jackson Lewis attorneys are available to discuss employers’ rights and obligations under USERRA, as well as the interplay between USERRA and the patchwork of state statutes governing employment of Reservists and National Guardsmen.

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