

LAW REVIEW 14059

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EEOC Sues Employer for Firing Disabled Veteran

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In a press release dated April 23, 2014, the United States Equal Employment Opportunity Commission (EEOC)¹ announced that it had filed suit against EZEFLOW USA Inc. in the United States District Court for the Western District of Pennsylvania, on behalf of Adam Brant, a

¹ According to the EEOC website (www.eeoc.gov), the EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Most employers with at least 15 employees are covered by EEOC laws (20 employees in age discrimination cases). Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits.

The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. The agency's role in an investigation is to fairly and accurately assess the allegations in the charge and then make a finding. If the EEOC finds that discrimination has occurred, it will try to settle the charge. If it is not successful, it has the authority to file a lawsuit to protect the rights of individuals and the interests of the public. It does not, however, file lawsuits in all cases where it finds discrimination.

Marine Corps veteran of Iraq and Afghanistan.² The Civil Action Number is 2:14-cv-00527-MPK. The EEOC contends that the company violated the Americans with Disabilities Act (ADA) by denying Brant's request for unpaid leave from his EZEFLOW USA job for medical treatment and recuperation related to symptoms of Post Traumatic Stress Disorder (PTSD) that Brant suffered as a result of his combat service in Iraq and Afghanistan.

As a condition precedent to filing suit in federal court under the ADA or other laws enforced by the EEOC, an individual must first file a written complaint against the employer or prospective employer with the EEOC. The EEOC then investigates and attempts to mediate the complaint. At the conclusion of that process, the EEOC normally gives the complainant a "right to sue letter" and the individual can then sue the employer in federal court with retained private counsel or *pro se* (meaning that the complainant is acting as his or her own attorney).³ If the EEOC believes that the case has merit and that the case is exceedingly important, the agency brings the case for the complainant, at no cost to the complainant. That is what happened in this case.

USERRA is a great law, but it does not help Brant.

Regular readers of this column⁴ will recognize that more than 800 of our 1,050 published "Law Review" articles are about the Uniformed

² Brant enlisted in the Marine Corps and served on active duty for several years, including service in both Iraq and Afghanistan, before he was honorably discharged. He was hired by EZEFLOW USA as a maintenance technician on September 17, 2012. Brant suffered several seizures starting on December 4, 2012, and the seizures were later determined to be related to Post Traumatic Stress Disorder (PTSD) that resulted from events during his Marine Corps service. Brant requested six weeks of unpaid military leave, and EZEFLOW USA denied the request and then fired Brant.

³ I do not recommend *pro se* representation. Abraham Lincoln said: "A man who represents himself has a fool for a client." And the law is so much more complex today than it was during Lincoln's lifetime.

⁴ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,050 articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search

Services Employment and Reemployment Rights Act (USERRA). As I explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II.

USERRA is codified at 38 U.S.C. 4301-4335.⁵ Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services and who meets the USERRA eligibility conditions⁶ is entitled to be reemployed in the civilian job position that he or she would have attained if continuously employed⁷ or another position, for which the person is qualified, that is of like seniority, status, and pay.⁸

As I explained in Law Review 0854 and other articles, USERRA provides important rights for the person who meets the USERRA eligibility criteria and who returns to the civilian job with a temporary or permanent disability incurred or aggravated during the period of uniformed service. The employer must make reasonable efforts to

function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

⁵ The citation means that you can find USERRA in title 38 of the United States Code, at sections 4301 through 4335.

⁶ The service member must have left a civilian position of employment for the purpose of performing voluntary or involuntary uniformed service and must have given the employer prior oral or written notice. The person must have been released from the period of service without having received a disqualifying bad discharge from the military and without having exceeded USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment. After release from service, the person must have made a timely application for reemployment with the pre-service employer. After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁷ The position that the individual would have attained if continuously employed is usually but not always the position that the person left for uniformed service. The position to which the person is entitled upon reemployment may be better than the position the person left, equivalent to that position, worse than that position, or no position at all, depending upon what *would have happened* if the person had remained continuously employed in the civilian job instead of leaving for uniformed service.

⁸ 38 U.S.C. 4313(a)(2)(A).

accommodate the disability in the position that the person would have attained if continuously employed. If the disability cannot be reasonably accommodated in that position, the employer must reemploy the returning service member in another position for which he or she is qualified or can become qualified with reasonable employer efforts.⁹ USERRA provides valuable rights to returning disabled veterans in many cases, but USERRA does not help Brant because he did not work for EZEFLOW USA before he enlisted in the Marine Corps.

One might try to argue that USERRA entitled Brant to be away from his EZEFLOW USA job for medical treatment and recuperation because the treatment and recuperation were necessitated by a condition that he sustained while on active duty and in the line of duty. USERRA's definition of "service in the uniformed services" includes "a period for which a person is absent from a position of employment for the purpose of an *examination* to determine the fitness of the person to perform any such duty."¹⁰ USERRA gives a person the right to be absent from his or her civilian job for a medical *examination* under certain circumstances, but not for medical *treatment*.

As I explained in Law Review 0965, during the 111th Congress (2009-10) Representative Lloyd Doggett of Texas introduced the Wounded Warrior Job Security Act, H.R. 466. That bill would have amended USERRA to provide for the job-protected right to absent oneself from one's civilian job for medical *treatment* necessitated by a condition that one had incurred or aggravated during military service. Representative Doggett's bill was not enacted, and USERRA does not give a service member or veteran the job-protected right to be absent from his or her civilian job for medical *treatment*, even for a service-connected condition.

⁹ 38 U.S.C. 4313(a)(3).

¹⁰ 38 U.S.C. 4303(13) (emphasis supplied).

The FMLA is a great law, but it does not help Brant.

Under the Family Medical Leave Act (FMLA), an employee has the right to up to 12 weeks of unpaid job-protected leave for a serious health condition that makes the employee unable to perform the employee's job¹¹, but the FMLA does not apply to all employers and does not apply to all employees of covered employers. To have the right to job-protected leave under the FMLA, the employee must have worked for that employer for at least 12 months and must have worked at least 1,250 hours for that employer during the 12 months preceding the leave.¹² The FMLA did not help Brant because he had been hired by EZEFLOW USA a few weeks before he developed the medical condition (seizures) that necessitated the leave.

The ADA helps Brant even when other statutes do not.

Under the ADA, an employer that is engaged in interstate commerce and that has at least 15 employees is required to make reasonable accommodations for a qualified employee or prospective employee who has a disability.¹³ Disabled veterans like Brant certainly qualify as disabled persons for purposes of the ADA. The EEOC's theory in this lawsuit is that granting a six-week unpaid medical leave for a person like Brant is a reasonable accommodation that the employer is required to make and that EZEFLOW USA violated the ADA by refusing to grant Brant's request for six weeks of unpaid medical leave.

This case is important because it points to another legal theory that is available to an individual who needs job-protected unpaid leave for medical treatment and recuperation for a medical condition that is

¹¹ 29 U.S.C. 2612(a)(1)(D).

¹² 29 U.S.C. 2611(2)(A).

¹³ 42 U.S.C. 12111(9).

related to the individual's military service. I congratulate the EEOC for its imaginative, diligent, and effective enforcement of the ADA and other laws. We will keep the readers informed of developments in this case.