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UNITED STATES DISTRICT COURT

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DISTRICT OF ARIZONA

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Chase W. Drake,

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CV 09-392 TUC DCB

9

Plaintiff,

)

10

v.

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ORDER

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Tucsan, Inc.,

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Defendants.

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The Court grants the Motion to Dismiss the Complaint because reemployment rights under the Uniformed Services Employment and Reemployment Act, 38 U.C.S. § 4312, (USERRA) for active members of the armed services hinge on completing the uniformed service obligation.

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Introduction

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Plaintiff, Chase W. Drake, was an active member of the United States Air Force (USAF), when he began “moonlighting” on March 1, 2008, as a doorman at the Tens Nightclub owned by Defendant. He worked as a doorman at Tens until June 15, 2008, when USAF changed his active duty assignment and deployed him to Qatar for 179 days. It is undisputed that he was not a member of the National Guard or Reserves, nor discharged or released from active duty. Plaintiff believes that Defendant had a legal obligation to reemploy him under USERRA, 38 U.S.C. § 4312, when he returned from Qatar on February 4, 2009. Tens refused him reemployment.

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1 **Uniformed Services Employment and Reemployment Act**

2 “Any individual whose absence from a position of employment is necessitated by
3 reason of service in the uniformed services is entitled to the reemployment rights and benefits
4 “ (Response at 3 (citing *Vander Wal v. Sykes Enterprises, Inc.*, 377 F. Supp. 2d 738 (N.D.
5 2005) (reservist case). Plaintiff correctly argues that USERRA coverage terminates if a
6 person is separated or discharged from service with a dishonorable or bad conduct discharge,
7 38 U.S.C. 4304; 20 C.F.R. 1002.32, but this does not mean USERRA coverage is limited to
8 individuals who have been discharged from duty. *Id.* at 3.

9 Section 4312 in USERRA pertains to the reemployment rights of members of the
10 armed services, in relevant part as follows:

11 **(a)** Subject to subsections (b), (c), and (d) and to section 4304, any
12 person whose absence from a position of employment is necessitated by
13 reason of service in the uniformed services shall be entitled to the
14 reemployment rights and benefits and other employment benefits of this
15 chapter if--

16 **(1)** the person . . . has given advance written or verbal notice of
17 such service to such person's employer;

18 **(2)** the cumulative length of the absence and of all previous
19 absences from a position of employment with that employer by
20 reason of service in the uniformed services does not exceed five
21 years; and

22 **(3)** except as provided in subsection (f), the person reports to, or
23 submits an application for reemployment to, such employer in
24 accordance with the provisions of subsection (e).

25 **(b)** No notice is required under subsection (a)(1) if the giving of such
26 notice is precluded by military necessity . . .

27 **(c)** Subsection (a) shall apply to a person who is absent from a position
28 of employment by reason of service in the uniformed services if such
person's cumulative period of service in the uniformed services, with
respect to the employer relationship for which a person seeks
reemployment, does not exceed five years, . . .

1 * * *

2 (e)(1) Subject to paragraph (2), a person referred to in subsection (a)
3 shall, *upon the completion of a period of service in the uniformed*
4 *services*, notify the employer referred to in such subsection of the
5 person's intent to return to a position of employment with such employer
6 as follows:

7 * * *

8 (C) In the case of a person whose *period of service* in the
9 uniformed services was for more than 30 days but less than 181
10 days, by submitting an application for reemployment with the
11 employer not later than 14 days *after the completion of the period*
12 *of service* or if submitting such application within such period is
13 impossible or unreasonable through no fault of the person, the next
14 first full calendar day when submission of such application
15 becomes possible.

16 (D) In the case of a person whose *period of service* in the
17 uniformed services was for more than 180 days, by submitting an
18 application for reemployment with the employer not later than 90
19 days *after the completion of the period of service*.

20 * * *

21 (f)(1) A person who submits an application for reemployment in
22 accordance with subparagraph (C) or (D) of subsection (e)(1) or
23 subsection (e)(2) shall provide to the person's employer (upon the request
24 of such employer) documentation to establish that--

25 (A) the person's application is timely;

26 (B) the person has not exceeded the service limitations set forth in
27 subsection (a)(2) . . . ; and

28 (C) the person's entitlement to the benefits under this chapter has
not been terminated pursuant to section 4304.

38 U.S.C. § 4312 (emphasis added).

It is undisputed that the Plaintiff gave Defendant notice that he was being
deployed to Qatar, he applied for reemployment with Tens within 14 days, his absence
did not exceed 5-years, and his service has not been terminated with a dishonorable or
bad conduct discharge. Plaintiff's service has not been terminated at all.

1 duty, as long as the definition encompasses him. *Bell v. United States*, 366 U.S. 393,
2 410-411 (1960) (considering the definition for determining military pay, which is a
3 statutory right). “The legal relationship created by active duty service is not set aside
4 simply because the ‘nature’ of the servicemember’s military involvement seems
5 inconsistent with the performance of actual military duties.” *Archie Allison v. United*
6 *States*, 426 F.2d 1324, 1013 (6th Cir. 1970) (citing *Lampitt v. United States*, 753 F.2d 702
7 (8th Cir.)).

8 Plaintiff is correct that “[a]lthough most often understood as applying to
9 National Guard and reserve military personnel, USERRA also applies to persons serving
10 in the *active components of the Armed Forces*.” (Response at 3-4 (citing 20 C.F.R. §
11 1002.6)) (emphasis added). The purpose of USERRA is “to encourage *noncareer* service
12 in the uniformed services by eliminating or minimizing the disadvantages to civilian
13 careers and employment which can result from such service.” 38 U.S.C. 4301(a)(1).
14 USERRA’s definition for “noncareer service” is as follows: “The period of active
15 uniformed service required to complete the initial uniformed service obligation; a period
16 of active duty or full-time National Guard duty that is for a specified purpose and
17 duration with no expressed or implied commitment for continued active duty; or
18 participation in the Reserve component as a member of the Ready Reserve performing
19 annual training, active duty for training or inactive duty training. *Continuous or repeated*
20 *active uniformed service or full-time National Guard duty that results in eligibility for*
21 *regular retirement for the Armed Forces is not considered non-career service.*” *Barker*
22 *v. Office of Adjutant General*, 907 N.R. 2d 574, 580 (Ind. App. 2009).

23 This distinction is important because there are no reemployment rights where a
24 service member abandons his civil career for a career in the military. *Id.* Only noncareer
25 service members must be reemployed by their pre-service employer when their period of
26 active service or duty is completed. 38 U.S.C. § 4312.

1 Members of the reserves are deployed to active military duty for a specified
2 purpose and duration, and given formal release orders upon completion of the
3 deployment. *See* 32 C.F.R. § 104.3; *Vander Wal v. Sykes*, 377 F. Supp.2d 738 (N. Dak.
4 2005) (discussing promptness requirement for reemployment of reserve members of
5 National Guard unit); *Dominguez v. Miami-Dade County*, 2009 WL 3756365 * 1 (S.D.
6 Flor. 2009) (USERRA anti-discrimination provision required employer to allow fire
7 fighter reservist to take lieutenant exam given during his deployment to active duty);
8 *Haight v. Katch, LLC.*, 2005 WL 2464643 * 2 (Neb. 2005) (describing reservist as being
9 mobilized to active duty and sent back due to medical reasons as being on active duty
10 because he remained under military orders and had not been officially released from
11 mobilization).

12 In contrast, Plaintiff, was/is a full-time enlisted member in the air force, with a
13 specified period of active uniformed service required to complete his initial uniformed
14 service obligation. *See* 32 C.F.R. § 104.3; *Garcia v. United States*, 57 Fed. Cl. 398
15 (2003) (describing entitlement to military pay from date of enlistment until enlistment
16 expires); *McClain v. Somerville*, 424 F. Supp. 2d 329, (Mass. 2006) (describing plaintiff
17 as enlisting for a term of service that was to last until January 4, 2002). Plaintiff's
18 deployment to Qatar did not change his active duty status. He was on active duty while
19 moonlighting at Tens, on active duty in Qatar, on active duty when he returned, and
20 remains on active duty. When this duty obligation is complete, he will be entitled to the
21 reemployment protection afforded by USERRA, 38 U.S.C. § 4312. *See Haight v. Katch,*
22 *LLC.*, 2005 WL 2464643 at *3 n. 2 (in dicta, concluding that plaintiff did not have the
23 right under USERRA to demand reinstatement of his civilian employment while still,
24 albeit only technically, mobilized).

25 Plaintiff does not allege a claim of discrimination under USERRA, 38 U.S.C. §
26 4311, which prohibits discrimination in hiring based on active service in the military.
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1 Both full-time service members and reservists are protected against discrimination on the
2 basis of unavailability due to active service in the military, and there is no difference in
3 requiring an employer to hold a permanent job open for an existing employee who may
4 leave for military service or requiring an employer to delay permanent hiring for an
5 employee who is not available due to military service. *McLain v. Somerville*, 424 F.
6 Supp. 2d 329, 334-335 (Mass. 2006).

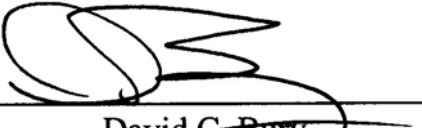
7 To state a *prima facie* case of discrimination under USERRA, a plaintiff must
8 make an initial showing that military status was at least a motivating or substantial factor
9 in the employer's action. If the employee makes such a showing, the employer must
10 prove, by a preponderance of evidence, that the action would have been taken despite the
11 protected status. *Hogan v. United Parcel Service*, 648 F. Supp. 2d 1128, 1138 (Missouri
12 2009). Here, "[t]he Complaint includes information as to Drake's status as an active
13 member of Armed Forces, dates of employment by Tens, period of deployment, date of
14 re-application for employment and Tens continued refusal to reemploy Drake."
15 (Response at 5.) This states a claim under USERRA, 38 U.S.C. § 3412, which fails as a
16 matter of law; it does not state a claim of discrimination under USERRA, 38 U.S.C. §
17 3411.

18 **Accordingly,**

19 **IT IS ORDERED** that the Motion to Dismiss (document 13) is GRANTED.

20 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter Judgment
21 accordingly.
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23 DATED this 11th day of January, 2010.

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27 David C. Bury
28 United States District Judge