

LAW REVIEW¹ 11081

October 2011

Does DOL Delay Count Against Me in Timeliness of My Lawsuit?

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.4—USERRA enforcement

1.6—USERRA and statutes of limitations

1.8—Relationship between USERRA and other laws/policies

4.7—SCRA extension of statutes of limitations and redemption periods

Q: I am a Lieutenant Colonel in the Army Reserve and a life member of ROA. I read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act

(USERRA). I worked for a major company in Illinois.³

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “Law Review” 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), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³This situation is not really in Illinois. I changed the location to protect the individual’s privacy.

I was called to active duty in 2004 and deployed to Iraq. I was released from active duty in 2005 and promptly applied for reemployment in my civilian job. I returned to work, but just three months later I was fired.

I believe that the firing violated sections 4311 and 4316(c) of USERRA. I believe that the firing was motivated by my Army Reserve service and the possibility that I would be called to the colors again. Moreover, I was still within the one year of special protection against discharge, except for cause, and I was fired without cause.

I promptly complained to Employer Support of the Guard and Reserve (ESGR), and an ESGR volunteer ombudsman contacted the employer on my behalf. The employer denied violating USERRA but otherwise refused to discuss the matter with the ombudsman.

After two months, ESGR referred me to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and I filed a formal written USERRA complaint against my employer with that agency. The DOL-VETS investigator waited months before starting the investigation, and then he took the employer's word for it that they had not violated USERRA, and closed my case. I sought the assistance of my Congressman, and the case was reopened. Finally, DOL found my case to have merit and referred it to the Department of Justice (DOJ). More months passed, and finally DOJ sent me a letter stating that DOJ will not represent me, but without explaining the reason for the declination. Despite inquiries from me and my Congressman, DOJ has declined to explain why it won't take my case.

The DOJ letter explained that I could retain private counsel and proceed with my case, but it did not suggest a specific attorney. For months, I searched for a lawyer who knows how to spell "USERRA." Finally, I found a lawyer, and he filed the case promptly after I retained him.

The defendant moved the court to dismiss, claiming that a four-year statute of limitations applies and that my lawsuit was filed two days after the statute of limitations expired. The judge agreed and dismissed my case as untimely. I got screwed!

I thought that there was no statute of limitations under USERRA. And in any case, the time that DOL and DOJ spent on my case (more than three years) should be excluded from the four-year time limit. What do you think?

A: Congress enacted USERRA in 1994, as a long-overdue replacement for the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. The VRRA and USERRA have never had a statute of limitations, and in 1974 Congress amended the VRRA to make clear that no state statute of limitations is to be applied to VRRA cases. In 1994, Congress carried over that "no state statute of limitations" language into USERRA, without change.

In 1990, Congress enacted a four-year “default” statute of limitations for civil actions in federal court that are based on congressional enactments after December 1990, if that particular congressional enactment does not have a statute of limitations. 28 U.S.C. 1658(a). There has been a division of authority in the courts as to whether section 1658(a) applies. USERRA was enacted after 1990, but it is a rewrite of a law that goes back to 1940. But the majority rule seems to be that section 1658(a) does apply.

On October 8, 2008, Congress amended USERRA, adding a new section 4327. That section provides, in pertinent part, as follows: “If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be *no limit* on the period for filing the complaint or claim.” 38 U.S.C. 4327(b) (emphasis supplied).

It is now clear that there is *no statute of limitations* on filing a USERRA claim that *accrued on or after October 8, 2008*. But what about a claim (like your claim) that accrued prior to that date?

In Law Review 1125 I argued that the 2008 “no statute of limitations” rule should be applied retroactively to USERRA causes of action that accrued prior to the October 8, 2008 enactment of that provision. Unfortunately, the United States Court of Appeals for the Seventh Circuit⁴] disagreed with my analysis and held that the 2008 amendment is not to be applied retroactively. *See Middleton v. City of Chicago*, 2009 U.S. App. 18979 (7th Cir. Aug. 24, 2009). I discuss the implications of *Middleton* in Law Review 1148.

Your USERRA case will have to be filed in Illinois, based on the employer’s location in that state.⁵ Thus, the district court judge will likely consider himself or herself bound by this 7th Circuit precedent.

As to your assertion that you should not be charged (for timeliness purposes) with the DOL and DOJ delay, there is some 1994 legislative history, some 1974 legislative history, and some VRRA case law in support of your argument. I invite your attention to House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2472:

“Section 4322(d)(7) [now 4327(b)] would reaffirm the 1974 amendment to chapter 43 that no State statute of limitations shall apply to any action under this chapter. It is also intended that state statutes of limitations not be used even by analogy. *See Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1056-57 (6th Cir.1983). Moreover, the Committee [House Committee on Veterans’ Affairs] reaffirms, as was made clear in the 1974 legislative history, ‘that the time spent by government agencies charged with the administration and enforcement of this act in investigation, negotiation and preparation for suit shall not be charged against the veteran in the consideration of any time-barred

⁴The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

⁵38 U.S.C. § 4323(c)(2).

*defense,' i.e. laches. Senate Report No. 93-907, 93rd Cong. 2d Sess. at 111-112 (June 10, 1974). See *Lemmon v. Santa Cruz County, Cal.*, 686 F. Supp. 797, 805 (N.D. Cal. 1988)."*

Emphasis supplied.

There is another argument you can make, under another law, the SCRA. "The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or a political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns." 50 U.S.C. App. 526(a).

Were you on active duty for any period of time during the four-year period that started on the day you were fired? If so, the four-year statute of limitations was tolled (i.e. stopped running) during that active duty period.

Update – March 2022⁶

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.⁷ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant section cited throughout the article can be found at:

50 U.S.C. App. § 526 discussing the statute of limitations can be found at 50 U.S.C. § 3936.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved.*⁸

Please join or support ROA

This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

⁶Update by Second Lieutenant Lauren Walker, USMC.

⁷*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra> (last visited Mar. 10, 2022).

⁸Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s eight⁹ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE

⁹Congress recently established the United States Space Force as the 8th uniformed service.