

## LAW REVIEW 1185

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### USERRA and the National Football League

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#### 1.1.3.2—USERRA Applies to Regular Military Service

##### 1.3.1.1—Left Job for Service and Gave Prior Notice

##### 1.3.2.9—Accommodations for Returning Disabled Veterans

This [week's news](#) has raised again the issue of the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to professional sports teams. Yes, USERRA applies to such teams, as employers.

The latest case involves Eric Kettani, who was a member of the practice squad of the New England Patriots until he was cut a few days ago, when the Navy ordered him to report to USS KILAKRING (FFG-42) as the ship was deploying from its home port in Mayport, Florida.

Kettani was a football standout at the United States Naval Academy (USNA). In 2009, he graduated and was commissioned an Ensign. Of course, even a journeyman player in the National Football League (NFL) can make as much in one year as a member of the armed forces would make in a decade or more.

Like any service academy graduate, Kettani has an obligation to remain on active duty for at least five years after commissioning, or until 2014. He asked the Navy for an accommodation, cutting short his active duty obligation to enable him to make big bucks in the NFL, but the Navy declined.<sup>[1]</sup>

The Navy did permit Kettani to attend the New England Patriots training camp this summer. He did not make the team, but he did make the practice squad. Under NFL rules, the active roster of a team is limited to 53 players, and the team is permitted to maintain a practice squad with an additional 8 players. Practice squad members are paid \$5,200 per week. A practice squad member cannot be added to the active roster during a game, but he can be added for the next week, after a player is cut or put on the injured reserve status.

Will Kettani have the right to reemployment under USERRA? Probably not. He did not leave a position of civilian employment to enter active duty, voluntarily or involuntarily. He was already on full-time active duty when he attended the Patriots' training camp and participated in the team's practice squad for the first few games of the 2011 season. But when Kettani completes his Navy obligation the Patriots or some other team will almost certainly give him a shot.

I have noted many "blog" entries castigating the Patriots for cutting Kettani from the practice squad—how could a team called the "Patriots" do something so unpatriotic? (Some of the blog entries suggested.) This criticism is misplaced. Even if Kettani clearly had USERRA rights, cutting him from the practice squad would not have been unlawful. An employer is not required to hold a position open, but the lack of a vacancy upon the veteran's return does not defeat the veteran's right to reemployment.<sup>[2]</sup> It would have been pointless for the Patriots to waste one of the precious practice squad slots just to keep Kettani on the squad.

Eric Kettani's situation can be contrasted with that of Patrick Tillman, a defensive back for the Arizona Cardinals. After the terrorist attacks of September 11, 2001, Tillman decided that he should serve in our armed forces. He enlisted in the Army as a Private, and he was killed in action in Afghanistan.

As I explained in [Law Review 0719](#), USERRA applies to regular military service as well as service in the National Guard or Reserve. If Tillman had been released from active duty without having exceeded the five-year limit<sup>[3]</sup> and

without having received a punitive or other-than-honorable discharge, and if he had made a timely application for reemployment with the Arizona Cardinals after release, he would have had the right to reemployment under USERRA.

If Tillman had returned from active duty uninjured, he would not have needed to exercise his USERRA rights. After his tragic death, his agent reported that several NFL teams had contacted the agent seeking to sign Tillman after he was released from the Army. But what if Tillman had survived the friendly fire tragedy but had lost a leg? Would he have had USERRA rights in that scenario? Yes.

Under section 4313(a)(3) of USERRA [38 U.S.C. 4313(a)(3)], the Arizona Cardinals would have had an obligation to make reasonable efforts to accommodate Tillman's service-connected disability. I am willing to concede that there is no reasonable accommodation that a team could make to enable a one-legged man to play in the NFL, but under section 4313(a)(3) the Cardinals would have had the obligation to reemploy Tillman in another position that provided like seniority, status and pay, or the closest approximation there of consistent with the circumstances of the case. A one-legged Pat Tillman could not return to the active roster, but he could be a coach or could be employed in some other capacity.<sup>[4]</sup>

USERRA applies to almost all employers in this country, including the Federal Government, state and local governments, and private employers, regardless of size. Professional sports teams have not requested and have not obtained an exemption from USERRA.

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[1] The Navy is still getting flack for making such an accommodation for David Robinson, releasing him after just two years to enable him to play in the National Basketball Association, and that was a quarter century ago. Moreover, today, unlike in David Robinson's day, we are engaged in a global war on terrorism.

[2] Please see [Law Review 0829](#) for a discussion of how USERRA overrides the interests of the replacement employee. That would not be a problem in the NFL situation. Even on a week-to-week basis, there is considerable fluidity in the composition of the 53-man active roster and the 8-man practice squad. I invite your attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 800 articles about USERRA and other military-relevant laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[3] Please see [Law Review 201](#) for a detailed discussion of what counts and does not count in exhausting the limit.

[4] Please see [Law Review 0640](#) for a detailed discussion of the application of USERRA to the returning disabled veteran.