

LAW REVIEW 1260

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Service Academy Admissions Work is *NOT* Protected by USERRA

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1.3.1.1—Left Job for Service and Gave Prior Notice

Q: I am an Air Force Reserve Colonel and a life member of ROA. I command an Air Force Reserve unit, and I also do a great deal of additional "Academy liaison" work. I interview candidates for the Air Force Academy and for Air Force ROTC.

I am also an airline pilot. I try to schedule my Air Force Reserve drills and my academy liaison work around my airline schedule, but several times a year I find it necessary to take military leave from my airline job, for a day or two, for this Air Force service. I am approaching my mandatory retirement date (30 years of commissioned service). I will soon turn over command of the Air Force Reserve unit and become a "gray area retiree" until I turn 60 in 2020 and start drawing my reserve retired pay.

I want to continue the academy liaison work after I retire from the Air Force Reserve. If I need to miss a day of work at the airline to interview a candidate for the Air Force Academy, is my absence from work that day protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: No. This academy liaison work is probably not protected by USERRA now, when you are a drilling reservist, and it is certainly not protected when you are a gray area retiree.

As I explained in [Law Review 0766](#), and other articles, you must meet five eligibility criteria in order to have the right to reemployment following absence from a job (for a few minutes or up to five years) to perform uniformed service:

1. You must have left the job *for the purpose of performing service in the uniformed services*. If the activity that you perform during the time that you are away from work does not qualify as "service in the uniformed services" under the USERRA definition, you do not meet this criterion.
2. You must have given the employer prior oral or written notice.
3. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. All involuntary service and some voluntary service (including Reserve and National Guard training) are exempted from the computation of the five-year limit.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have reported back to work in a timely manner or have submitted a timely application for reemployment, after release from the period of service.

It is necessary to meet all five of these criteria in order to have the right to reemployment. If you fail to meet the first criterion, it is not necessary to determine whether you meet the other four. If your activity of interviewing Academy and ROTC

candidates does not qualify as “service in the uniformed services” for USERRA purposes, you do not have the right to miss a day of work (even without pay) for this purpose.

USERRA is codified in sections 4301-4335 of title 38 of the United States Code (38 U.S.C. 4301-4335). Section 4303 defines 16 terms used in this law, including the term “service in the uniformed services” which is defined as follows:

The term ‘service in the uniformed services’ means the performance of duty on a voluntary or involuntary basis in a uniformed service *under competent authority* and includes active duty, active duty for training, initial active duty for training, *inactive duty training*, full-time National Guard duty, 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 for any such duty, and a period for which a person is absent from a position of employment for the purpose of performing funeral honors duty as authorized under section 12503 of title 10 or section 115 of title 32.

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

This definition is broad, but it is not broad enough to cover activities that the individual Reserve Component (RC) member may engage in to support his or her unit or component but for which the member receives no compensation, not even retirement points. I am aware that many members (especially commanding officers) engage in substantial military activities between drill weekends and other periods of military service. These activities are expected by the component, but that does not mean that they are protected by USERRA. You do not have the right to take time off from your civilian job (even time off without pay) to do military-related activities that do not fall within USERRA’s definition of “service in the uniformed services.”

There is such a thing as inactive duty training (drills) for retirement points only. Of the 4,401 retirement points that I earned during 37 years of service, more than 300 were points-only drills that I performed as a member of Naval Reserve VTU Law 0601 in Washington, DC.

USERRA’s definition of “service in the uniformed services” includes inactive duty training, and that would include inactive duty training for points only. If you receive retirement points for your activity of interviewing Air Force Academy and Air Force ROTC candidates, then that activity would constitute “service in the uniformed services” and you have the job-protected right to miss work to perform that activity. If you do not receive retirement points or other official compensation for this activity, it does not constitute “service in the uniformed services” and is not protected by USERRA.

I invite your attention to *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002).^[1] John C. Leisek, a member of the Oregon Army National Guard, took off all summer from his civilian job at Brightwood Corporation, for the purpose of participating in county fairs with his hot-air balloon, which included National Guard insignia. National Guard recruiting efforts may have benefited from Leisek’s activities, but the activities did not constitute “service in the uniformed services” as defined by USERRA, so Leisek did not have the right to time off from his civilian job for these activities, according to the United States Court of Appeals for the 9th Circuit.

You may be receiving retirement points for your interviewing activity now, but after you become a gray area retiree there will probably be no way for the Air Force to award you

such points. If you want to continue that activity, you should figure out a way to do it on days when you are not scheduled to fly for the airline.

[1] I discuss the implications of *Leisek* in detail in [Law Review 1131](#). Please see www.servicemembers-lawcenter.org. You will find 761 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.