

# Law Review 13004

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## **USERRA Does Not Provide for Reemployment of Active Duty Service Member Who Starts Job while on Active Duty and Seeks Reemployment after a Deployment**

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

1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employment

1.1.3.2—USERRA applies to regular military service

1.3.1.3—Timely application for reemployment

1.4—USERRA enforcement

### ***Drake v. Tuscan, Inc.*, 2010 U.S. Dist. LEXIS 2288 (D. Arizona January 12, 2010).**

Charles W. Drake was an enlisted member of the United States Air Force, on full-time regular active duty and assigned to an Air Force base in Arizona. On March 1, 2008, he began a part-time “moonlighting” job<sup>[1]</sup> as a doorman at Tens, a “gentleman’s club” owned and operated by Tuscan, Inc. The Air Force ordered him to deploy to Qatar for 179 days, from June 2008 to February 2009. At the end of this deployment, he returned to the base in Arizona, still on active duty. He gave Tuscan prior notice that he would need to leave his job because of the deployment, and he promptly applied for reemployment after he returned to Arizona. Tuscan refused to reemploy him, and this lawsuit resulted.

As I described in Law Review 1281<sup>[2]</sup> and other articles, an individual must meet five conditions to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA):

1. Must have left a civilian job for the purpose of performing service in the uniformed services.
2. Must have given the employer prior oral or written notice.
3. Cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, must not have exceeded five years.
4. Must have been released from the period of service without having received a disqualifying punitive (by court martial) or other-than-honorable discharge.
5. Must have made a timely application for reemployment after release from the period of service.

Yes, USERRA applies to part-time as well as full-time civilian employment.<sup>[3]</sup> Yes, USERRA applies to regular military service, as well as service in the National Guard or Reserve.<sup>[4]</sup> Nonetheless, Drake did not have the right to reemployment at the club when he returned from his deployment to Qatar, because he failed to meet the last two of the five reemployment conditions. Drake was not released from the period of service without a disqualifying bad discharge—Drake had not been released from his period of service at all. And Drake did not make a timely application for reemployment *after release from the period of service*.

After Tuscan denied his application for reemployment, Drake retained private counsel<sup>[5]</sup> and brought this lawsuit. There is no evidence that Drake ever contacted Employer Support of the Guard and Reserve (ESGR)<sup>[6]</sup> or the Department of Labor’s Veterans’ Employment and Training Service (DOL-VETS) with respect to his claim under USERRA, and he was not required to do so. Unlike other statutes,<sup>[7]</sup> USERRA has no “exhaustion of remedies” requirement and no “right to sue letter” need be obtained before filing suit in federal court.

After Drake filed suit against Tuscan in the United States District Court for the District of Arizona, Tuscan filed a motion to dismiss the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To get a case dismissed on that basis, the defendant must show that the plaintiff is not entitled to any relief that the court can award *even assuming that all of the plaintiff’s factual assertions are correct*. Judge David C. Bury granted the defendant’s

motion to dismiss on January 12, 2010. In this decision, Judge Bury explains his reasoning in granting the motion to dismiss. I believe that his reasoning is sound and correct.

I found this case by using *LEXIS*, a computerized legal research service to which we subscribe here at ROA. I used that same service to check out the *Drake* case. I found that Drake did not appeal to the United States Court of Appeals for the 9<sup>th</sup> Circuit, and the time for doing so has long since expired, so this case is final. I also found that *Drake* is not cited in any later court decision that is published, even informally.

In the 30 years that I have been dealing with USERRA and the predecessor reemployment statute<sup>[8]</sup> I have heard questions based on this scenario several times. The question usually comes from a full-timer assigned to a reserve center. The full-timer has heard of the reemployment statute because of ESGR posters prominently displayed at the reserve center. The question usually goes as follows: “If the reemployment statute applies to the part-timers who drill at this reserve center, why does the statute not apply to me?” I have always patiently explained that the reemployment statute does not apply to a person who takes a new part-time civilian job *while already serving on active duty full-time*. The *Drake* decision vindicates the correctness of this answer that I have given numerous times.<sup>[9]</sup>

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<sup>[1]</sup> Under military regulations, Drake was required to obtain the permission of his Commanding Officer before starting a “moonlighting” job while on active duty. See 5 C.F.R. 2635.802, DoD 5500.7-R. Please see Law Review 147 (November 2004) for a discussion of this rule. This court decision does not discuss whether Drake requested or obtained such permission, and the issue of permission is not relevant to Drake’s right to reemployment upon returning from his overseas deployment.

<sup>[2]</sup> I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 826 articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) 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 function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

<sup>[3]</sup> Please see Law Review 1254 (May 2012).

<sup>[4]</sup> Please see Law Review 0719 (May 2007).

<sup>[5]</sup> Drake was represented by attorney Douglas H. Clark, Jr., of the law firm Mesch Clark & Rotschild PC in Tucson, Arizona.

<sup>[6]</sup> ESGR is a Department of Defense organization, established in 1973, that seeks to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. Please see Law Review 1301 (January 2013).

<sup>[7]</sup> For example, Title VII of the Civil Rights Act of 1964 (which forbids discrimination in employment on the basis of race, color, sex, religion, or national origin) requires a claimant to file a claim in writing with the Equal Employment Opportunity Commission (EEOC) and to obtain a “right to sue” letter from the EEOC as a condition precedent to filing suit.

<sup>[8]</sup> Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which dates back to 1940.

<sup>[9]</sup> I also invite the reader’s attention to Law Review 106 (December 2003). The article is titled “Don’t Try To Work at your Civilian Job while on Active Duty.”