LAW REVIEW 13062

May 2013

Employers—What Is Asked of You Is neither Unreasonable nor Unconstitutional

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

1.0—USERRA generally

As you receive this magazine in the mail, our nation marks the 40th anniversary of the end of the draft. The last draftee reported for induction in May 1973.

The All Volunteer Military has been a great success, and when Representative Charles Rangel of New York introduced legislation to reinstate the draft he could not find a single co-sponsor. Our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that we never need to return to an Army of ill-motivated conscripts.

In 1783, shortly after our nation achieved independence from Great Britain, General George Washington said, "Each citizen of a free government owes his services to defend it." Here at ROA headquarters, in the treasured Minuteman Memorial Building, those words are inscribed on the pedestal of "The Lexington Minuteman" statue.

Through most of our nation's history, major wars have called for conscription, and the constitutionality of the draft has never been in doubt. Almost a century ago, the Supreme Court unanimously (9-0) upheld the constitutionality of the draft during World War I. *See Selective Draft Law Cases,* 245 U.S. 366 (1918). *See also Perpich v. Department of Defense,* 496 U.S. 334 (1990).

The end of the draft by no means marks the end of our nation's need for military personnel, in the Active Component, the Reserve, and the National Guard. Congress recognized in 1973 and recognizes today that in the absence of conscription our nation needs to provide incentives and to mitigate disincentives to military service, so that a sufficient quality and quantity of young men and women will volunteer to serve our country in uniform.

Congress has enacted many laws to provide such incentives and to minimize such disincentives. One of the most important laws is the Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted in 1994 to replace with Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940 as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

As of February 5, 2013, the DoD reports 866,885 Reserve and National Guard personnel have been called to the colors since the terrorist attacks of September 11, 2001; almost 300,000 of these men and women have been called up more than once. Federal, state, local, and private sector employers have complained of the "burdens" that these call-ups, and the requirements of USERRA, have put on business. All too many employers have sought to shuck their USERRA obligations through various pretexts.

I have little patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve our country in uniform, but the burdens borne by employers pale to insignificance in comparison to the heavy burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who enlist and reenlist, and by their families.

To the nation's employers, especially those who are complaining, I say the following: Yes, USERRA puts a burden on employers. Congress fully appreciated that burden in 1940, in 1994, and at all other times. We as a nation are not drafting you, nor are we drafting your sons and daughters. You should celebrate those who are serving in your

place and in the place of your offspring. When you find citizen service members in your workforce or as job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.