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Please Don't Supplant USERRA

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On July 11, 2013, Senator Richard Blumenthal of Connecticut introduced S. 1281, the proposed "Veterans and Servicemembers Employment Rights and Housing Act of 2013." The bill was referred to the Senate Veterans' Affairs Committee. There are as yet no cosponsors.

Also on July 11, Representative Derek Kilmer of Washington introduced H.R. 2654, which is word-for-word identical to S. 1281. That bill was referred to the House Education and the

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[1]I 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.

[2]BA 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.

Workforce Committee and the House Judiciary Committee.[3] Representative Kilmer has recruited four cosponsors so far.

It would seem that those who drafted this legislation were unaware of the Uniformed Services Employment and Reemployment Rights Act (USERRA). This bill does not mention USERRA, either to repeal it or to explain how the provisions of this bill would relate to similar provisions in USERRA.

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[4] From the beginning in 1940, the federal reemployment statute has applied to the Federal Government and to private employers, regardless of size. In 1974, Congress amended the VRRA to make it apply to state and local governments as well. Like the VRRA, USERRA applies to almost all employers in the country.[5] Only religious institutions (on First Amendment grounds), Indian tribes (on residual sovereignty grounds), and foreign embassies and consulates and international organizations like the World Bank and the United Nations (on diplomatic immunity grounds) are exempt from USERRA enforcement.

The basic idea of USERRA is that if a person leaves a civilian job for voluntary or involuntary service in the uniformed services he or she is entitled to reemployment after release from the period of service.[6] The person must have given the employer prior oral or written notice, unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable. The person must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.[7] The person must have been released from the period of service without having received a disqualifying bad discharge, like a bad conduct discharge, a dishonorable discharge, or an administrative discharge characterized as "other-than-honorable." After release from the period of service, the person must have been timely in reporting back to work or applying for reemployment.[8]

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[3]Interestingly, the bill was not referred to the House of Veterans' Affairs Committee, where it would seem to belong.

[4]The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II. As enacted in 1940, the VRRA applied only to those who were drafted. The Service Extension Act of 1941 expanded the VRRA to include voluntary enlistees as well as daftees.

[5]The law also applies to the United States Government and the U.S. companies all over the world. Please see Law Review 24 (April 2001).

[6]Such service includes active duty, active duty for training, inactive duty training, initial active duty training, funeral honors duty, and time required to be away from a civilian job for the purpose of an examination to determine fitness to perform any such service. *See* 38 U.S.C. 4303(13).

[7]All involuntary service and some voluntary service are exempted from the computation of the individual's five-year limit. Please see law Review 201 (October 2012) for a detailed discussion of the five-year limit and its exceptions.

[8]Please see Law Review 1281 (October 2012) for a detailed discussion of the USERRA eligibility criteria.

A person who meets these criteria must be reemployed promptly in the position of employment that he or she *would have attained* if continuously employed or in another position for which he or she is qualified that provides like seniority, status, and pay. A person who is reemployed under USERRA must be treated *as if he or she had remained continuously employed* in the civilian job, for seniority and pension purposes.[9]

For the first 15 years (1940-55), the reemployment statute only applied to *active duty.* In 1955, Congress amended the VRRA to make the law apply as well to initial active duty training, active duty for training, and inactive duty training (drills) performed by Reservists. In 1960, Congress amended the law again to cover such duty performed by National Guard members.

As originally conceived in 1940, the reemployment statute applied to a once-in-a-lifetime occurrence. For example, my late father was a 29-year-old accountant at Peat Marwick Mitchell (a "Big 8" accounting firm that is now part of KPMG) when he was drafted in May 1941. When he was honorably discharged in October 1945, he had the right to reemployment but chose not to exercise it.

When being called to the colors and having reemployment rights was seen as a one-time event, there was no perceived need for discrimination protection. After Congress expanded the law to cover *recurring* periods of military training or service, some employers were tempted to fire National Guard and Reserve members in their employ, in order to rid themselves of the inconvenience of dealing with drill weekends and annual training tours. Accordingly, in 1968, Congress added a provision to the VRRA to make it unlawful for an employer to deny a person retention in employment or a promotion or incident or advantage of employment based on obligations as a member of a Reserve Component of the armed forces. In 1986, Congress expanded this provision to outlaw *discrimination in hiring* as well.

In 1994, when Congress enacted USERRA, it broadened and strengthened the prohibition of discrimination. Section 4311 of USERRA reads as follows:

"(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person
(1) has taken an action to enforce a protection afforded any person under this chapter,
(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

[9]Please see Law Review 1281 for a detailed discussion of the entitlement of the reemployment veteran.

(3) has assisted or otherwise participated in an investigation under this chapter, or
(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
(c) An employer shall be considered to have engaged in actions prohibited—
(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
(2) under subsection (b), if the person's
(A) action to enforce a protection afforded any person under this chapter,
(B) testimony or making of a statement in or in connection with any proceeding under this chapter,
(C) assistance or other participation in an investigation under this chapter, or
(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title."

38 U.S.C. 4311.

S. 1281 and H.R. 2654 say nothing about the right to reemployment for a person who leaves a job for voluntary or involuntary military service. These bills would make it unlawful for employers to discriminate in employment against those who are serving or have served our nation in uniform, but these bills add nothing significant to the protections that service members and veterans already have under section 4311 of USERRA.

S. 1281 and H.R. 2654 would graft a prohibition of discrimination against service members and veterans onto the enforcement mechanism for Title VII of the Civil Rights Act of 1964.[10] I believe that the USERRA enforcement mechanism is much more workable and claimant-friendly than the Title VII mechanism, and I oppose these bills for that reason, among other reasons.

Section 2(j) of these bills would apply the "disparate impact" theory of liability to cases involving alleged employment discrimination against veterans and service members. That would be helpful, but that addition would be better accomplished by amending USERRA.

[10]Title VII of the Civil Rights Act of 1964 outlaws employment discrimination based on race, color, sex, religion, or national origin.

The disparate impact theory of discrimination was first enunciated by the Supreme Court in a 1971 Title VII case—*Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).[11] The defendant employer had a rule requiring that power company linemen must have high school diplomas. In the years following the most lamentable "Jim Crow" era, a high school diploma requirement served to disqualify a much larger percentage of black people than white people. The Supreme Court held that an employer rule or practice that has such a disparate impact is unlawful, unless the employer can show a *business necessity* for the rule or practice.

It is unclear whether the disparate impact theory applies under section 4311 of USERRA. In a 2011 case, the Merit Systems Protection Board (MSPB)[12] held that the disparate impact theory does not apply to USERRA cases.[13]

In Law Review 162 (March 2005), I discussed a situation where the disparate impact theory would have been most useful. The situation involved hiring by a state juvenile justice department for staff at a detention facility for juvenile offenders. The state required that applicants for staff positions provide simple, truthful (as shown by polygraph) negative responses to the question: "Have you ever tried to hurt a human being?" No explanation was permitted—only a yes or no response was possible. Anyone answering yes or providing any additional response, or anyone whose polygraph showed deception, was denied employment.

Two recent veterans (one Army and one Marine) were denied employment because they could not provide simple "no" responses to this question, because both had participated in combat in Iraq. This situation did not result in a published decision because the two young men chose not to sue.

Section 3 of S. 1281 and H.R. 2654 would amend section 802 of the Fair Housing Act (42 U.S.C. 3602) and would outlaw housing discrimination with respect to service members and veterans. Such a prohibition might be useful, but I am not aware of any complaints by service members or veterans that they have been denied the opportunity to rent or buy a residence based on their military service.

In Law Review 0943 (October 2009), I addressed the situation wherein an Army Reserve officer was denied a mortgage (to buy a house) based on the bank's fear that he might be called to active duty and then might be unable to make payments on the mortgage. In that article, I stated that the Servicemembers Civil Relief Act (as currently written) does not outlaw such discrimination. It appears that S. 1281 and H.R. 2654 would not apply to creditworthiness decisions by banks on mortgage loan applications.

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[11]The citation means that you can find this case in Volume 401 of *United States Reports*, starting on page 424.
[12]The MSPB hears and adjudicates USERRA cases involving federal agencies as employers. *See* 38 U.S.C. 4324.
[13]*Harrellson v. United States Postal Service*, 2011 MSPB 3 (Jan. 11, 2011). I discuss the *Harrellson* case in detail in Law Review 1108 (February 2011). Harrellson apparently did not appeal to the United States of Appeals for the Federal Circuit, and I am not aware of any other published case addressing this issue.

Update – March 2022[14]

S. 1281 & H.R. 2654

The proposed legislation introduced by Senator Richard Blumenthal of Connecticut and Representative Derek Kilmer of Washington were never passed. Therefore, USERRA was not supplanted.

[14]Update by Second Lieutenant Lauren Walker, USMC.