# LAW REVIEW 13099
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## This Is Not your Father's National Guard

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

**1.2—USERRA forbids discrimination**
**1.3.1.1—Left job for service and gave prior notice**
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**1.8—Relationship between USERRA and other laws/policies**

**Q: I am a volunteer ombudsman for Employer Support of the Guard and Reserve (ESGR). I am also a retired Army Reserve Colonel and a life member of ROA. I have been a big fan of you and your "Law Review" articles[1] for almost a decade. When I first signed up as an ESGR ombudsman, I attended a three-day ESGR training course in Denver. I recall that you spoke about USERRA for almost eight hours the first day and for another two hours the morning of the second day. I found it all fascinating and most informative. I routinely use your "Law Review" articles in my ombudsman work.**

**I am working a case involving an E-6 in the Army National Guard. Let's call him Joe Smith. His unit is scheduled to perform its annual training October 12-26. The unit has also scheduled a "MUTA-10" for Monday-Friday, October 7-11. (MUTA is the military acronym for Multiple Unit Training Assembly.) These five drill days are in lieu of the October-February drill weekends. This training was scheduled almost a year ago, before the start of Fiscal Year 2013 on October 1, 2012, and all unit members were told to inform their civilian employers that they would be performing military training for three weeks in October 2013.**

**This Guard member is very concerned that his civilian employer (a small souvenir store) will fire him for missing three weeks of work during October. October is a busy month for the store, with lots of folks coming to see the fall foliage and our state university's football team. The Guard member said that the employer insists that drills for National Guard members can only be held on weekends and that the employer is not required to accommodate and will not accommodate drills held on weekdays.**

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 921 articles about laws that are especially 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. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012, and we have added another 99 so far in 2013.

**This National Guard member asked his Commanding Officer (CO) to be excused from the October training or at least from the MUTA-10, but the CO refused to excuse him. He called ESGR at the toll-free number (800-336-4590) and the case was assigned to me. Help!**

**A: As I explained in Law Review 104 (December 2003) and other articles, Congress enacted USERRA (Public Law 103-353) 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).[2] The VRRA served our country well for more than half a century, through World War II, the Korean War, the Vietnam War, and the Cold War, but by the time of the 1990-91 Persian Gulf War the law had become confusing and cumbersome through many piecemeal amendments.**

**Different sections of the VRRA and different rules applied to active duty performed by draftees, active duty performed by voluntary enlistees, and active duty performed by Reserve Component (RC) personnel who were called to active duty voluntarily or involuntarily. Still other sections and rules applied to initial active duty training, active duty for training, and inactive duty training (drills or unit training assemblies) performed by RC members.**

**The 1994 law (USERRA) eliminated these confusing and cumbersome distinctions. There are still distinctions between active duty and inactive duty training with respect to the computation of military compensation and with respect to the applicability of the Uniform Code of Military Justice (UCMJ), but for purposes of one's rights vis-à-vis one's civilian employer these distinctions have been eliminated. All of these forms of duty or training are consolidated in USERRA's definition of *service in the uniformed services.***

Section 4303 of USERRA defines 16 terms that are used in this law. The term *service in the uniformed services* is defined as follows:

**"(13)** 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 to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32."

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

[2] The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

Inactive duty training (drills or unit training assemblies) have never been limited to weekends. Until the 1970s, RC units generally drilled one evening per week.[3] Under USERRA, inactive duty training clearly falls within the definition of *service in the uniformed services.* An employee of any employer (federal, state, local, or private sector) has the right to time off from his or her job to perform inactive duty training or other forms of uniformed service, regardless of the day of the week when the service is performed.

Joe Smith has the right to reemployment after absence from work for service in the uniformed services if he meets these five conditions:

a. He left his job for the purpose of performing service in the uniformed services, including inactive duty training.
b. He gave the employer prior oral or written *notice.* He does not need the employer's *permission,* and the employer does not get a veto.
c. He has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he seeks reemployment.[4]
d. He has been released from the period of service without having received a disqualifying bad discharge.
e. After release from the period of service, he has been timely in reporting back to work or applying for reemployment.

Please see Law Review 1281 (August 2012) for a detailed discussion of USERRA's eligibility criteria and entitlements.

After a period of service of less than 31 days (like the three-week National Guard training in October 2013), Joe Smith is required to report back to work at his civilian job "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i).[5]

If Joe meets the five USERRA eligibility criteria after his October 2013 training duty or any period of uniformed service, he is entitled to reemployment, even if the civilian employer finds Joe's service burdensome or unreasonable. There is no "rule of reason" under USERRA.

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[3] Even after the change-over to weekend drills, to maximize training efficiency, some units continued drilling on weekday evenings. For many years in the 1980s and 1990s, I performed my Naval Reserve drills on Tuesday evenings in Voluntary Training Unit Law 0601, here in Washington, DC. The unit drilled at the Navy Annex, which was just recently torn down to make way for expansion of the Arlington National Cemetery.

[4] Joe's inactive duty training and active duty for training periods do not count toward his five-year limit. 38 U.S.C. 4312(c)(3).

[5] After a period of service of 31-180 days, Joe is required to apply for reemployment within 14 days after his release from service. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, Joe has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

Under the VRRA, there was a four-year limit on "active duty" with respect to any one employer, but there was no express limit on the duration of active duty for training and inactive duty training (either of a particular period or cumulatively with that employer). For almost 20 years, there was an intense dispute and conflicting court decisions about whether there was an implied limit or a "rule of reason." The Supreme Court finally put an end to that argument in 1991, when it held that there is no limit on the duration of ADT. *See King v. St. Vincent's Hospital*, 502 U.S. 215 (1991).

To the extent that there was any lingering doubt about the continuing existence of a "rule of reason," Congress drove a stake in it when it enacted 38 U.S.C. 4312(h):

"In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met."

This section could hardly be clearer, but the intent of Congress is further buttressed by USERRA's legislative history. In its report (House Report No. 103-65, 1994 *United States Code Congressional and Administrative News*, at page 2463), the House Committee on Veterans' Affairs wrote:

"Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital*. This new section makes clear the Committee's intent that no 'reasonableness' test be applied to determine re-employment rights and that this section prohibits consideration of timing, frequency or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements under sections 4312(a) and (e).

The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of appropriate military authorities [*see Hilliard v. New Jersey Army National Guard*, 527 F. Supp. 405, 411-412 (D. N.J. 1981)], and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate."

If we are to have a strong and ready military, including the National Guard and Reserve, we need a law like USERRA. In the absence of the draft (which was abolished 40 years ago in 1973), we as a nation need to provide incentives and to address disincentives, to encourage young men and women to volunteer.

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 the draft.

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 USERRA. As of July 9, 2013, the DoD reports 878,407 RC 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.

**Q: I explained all of this to Joe Smith. He told me explicitly that he does *not* want me to contact the employer on his behalf. It appears that perhaps Joe is exaggerating his employer's objection to his National Guard training scheduled for August 2013. I think that the real problem is that Joe does not want to go on this training.**

**Joe told me that when he joined the Army National Guard of our state in 1996 the recruiter told him that all that would ever be asked of him was one weekend of drills per month and two weeks of annual training in the summer, plus an occasional short-duration state call-up to quell riots, plow snow, fill sandbags, or fight fires. He told me that his father retired from the Army National Guard of this state, and he never did more than the minimum requirement of weekend drills and annual "summer camps."**

**Joe told me that he has 17 "good years" for reserve retirement purposes. He needs just three more good years to qualify for retirement benefits. He wants to do the minimum service in these last three years, just to qualify for his benefits. What do you say about this?**

**A:** I think that you need to explain the "facts of life" to Joe. This is not his father's Army National Guard. The "weekend warrior" days of the National Guard are gone, and probably gone forever. If he wants to stay in the National Guard for three more years to qualify for his retirement benefits, he needs to participate in training and other activities schedule by his National Guard unit.

In the days of Joe's father, the RC (including the Army National Guard) was considered a "strategic reserve" that was available only for World War III. Today, the RC is an "operational reserve" that is routinely called upon for military operations short of world war.

The transformation of the strategic reserve to the operational reserve began 23 years ago (August 2, 1990), when Saddam Hussein's Iraq invaded and occupied Kuwait. British Prime Minister Margaret Thatcher told our President that "this is no time to go wobbly, George." President George H.W. Bush drew "a line in the sand." He announced that he would use military force to protect Saudi Arabia and to liberate Kuwait. As part of his forceful military response to Hussein's abomination, he called up Reserve and National Guard units. This was the first significant RC call-up since the Korean War. Only a handful of RC units were called to the colors during the Vietnam War.

On July 7-8, 1990 (Saturday-Sunday), I accompanied RADM James J. Carey, USNR (the Commander of Naval Reservists in the mid-Atlantic states) on an inspection trip to the Naval Reserve Center in Roanoke, Virginia. I gave my speech about reemployment rights and mobilization readiness to about 100 Naval Reservists[6] who were present for their drill weekend. HM2[7] Bob Jones (not his real name) made a nuisance of himself as we were trying to get the reservists seated so I could start my speech.

[6] The title was later changed to Navy Reservists, thank you VADM John G. Cotton, USN.
[7] An HM2 is an enlisted medical specialist of the rank E-5.

HM2 Jones said, “I don’t want to hear this BS about mobilization readiness. The Naval Reserve has never been mobilized and never will be mobilized.” Within a month, Iraq invaded Kuwait. Within two months, HM2 Jones and his unit had been mobilized. To this day, Jones thinks that I did all of this to him. We call it “power of attorney.”

I do not doubt that recruiters exaggerate the benefits of military service and minimize the burdens. A recruiter needs to make his or her quota each month. I do not doubt that Smith’s recruiter told him in 1996 that he would never be asked to do more than one weekend a month and two weeks of annual training, but the recruiter’s “puffing” is not binding on the Army. When he enlisted in 1996, Smith signed a comprehensive, written enlistment contract. In several places, the enlistment contract includes a reminder, in **bold-faced print,** that the written enlistment contract is the entire agreement between the enlistee and the Government and that any oral assurances that the enlistee may have received are not binding if they are not included in the document.

You should explain the *parol evidence rule* to Smith. That rule has been defined as follows: “Under this rule, parol or extrinsic evidence is not admissible to add to, subtract from, vary or contradict judicial or official records or documents, or written instruments which dispose of property or are contractual in nature, and which are valid, complete, unambiguous and unaffected by accident or mistake.” *Black’s Law Dictionary, Revised Fourth Edition,* page 1273.

Every day, federal employees and military personnel (including recruiters) give out “bum scoop.” In two important cases, the Supreme Court has held that the Federal Government is *not bound by incorrect advice* given by federal employees or officials. *See Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990); *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380 (1947). I discuss the implications of these two cases in Law Review 1223 (March 2012), Law Review 1104 (January 2011), and Law Review 1008 (January 2010).

Smith has reenlisted twice since the terrorist attacks of September 11, 2001. I find it hard to believe that Smith really thinks that he has the right to dictate to the Army and the National Guard that “this much I will do and not a day more.”

As the Director of the Service Members Law Center, I am here answering telephone calls and e-mails during regular business hours and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to encourage Reserve Component personnel to call me from the privacy of their own homes, not from their civilian jobs. I receive and respond to 800 or more inquiries per month. The inquiries come from service members, military family members, employers, attorneys, ESGR volunteers, Department of Labor (DOL) investigators, congressional staffers, reporters, and others.

About half of the inquiries are about USERRA, and the other half are about everything that you can think of that has something to do with the military and law. I am particularly well qualified to address USERRA inquiries, as I have been dealing with the federal reemployment statute for

more than 30 years. I developed the interest and expertise in this law during the decade that I worked for DOL as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted USERRA.

I am available by telephone at 800-809-9448, extension 730, or by e-mail at SWright@roa.org. Please remember that the only stupid question is the one that was not asked.