# LAW REVIEW 13104
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## How Do I Judge a USERRA Settlement Offer?

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

**1.4—USERRA enforcement**
**1.8—Relationship between USERRA and other laws/policies**

**Q: I worked for Daddy Warbucks Industries (DWI), a major defense contractor, from 1999 until 2007, when I was called to active duty as a Captain (now a Major) in the Army National Guard. I was released from active duty in August 2009, and I immediately applied for reemployment at XYZ. The company flatly refused to reemploy me.**

**I have read with great interest your "Law Review" articles[1] about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I think that it is very clear that I was entitled to reemployment when I applied in August 2009, because I met the five eligibility criteria that you outlined in Law Review 1281 and other articles.**

**I left my job for the purpose of performing service in the uniformed services, and I gave prior notice to DWI, my employer. I am well within the five-year limit that you discuss in detail in Law Review 201. The first year (August 2007 to August 2008) was involuntary and does not count toward the limit. It is unclear whether the period from August 2008 until August 2009 counts toward the limit, but even if it does I am well short of the limit. I served honorably, most of the time in Iraq, and I was released from active duty without a disqualifying bad discharge. I applied for reemployment with DWI immediately after I left active duty, well within the 90-day limit set forth in section 4312(e)(1)(D) of USERRA, 38 U.S.C.** § 4312(e)(1)(D).

After DWI refused to reemploy me, I contacted Employer Support of the Guard and Reserve (ESGR), the Department of Defense (DOD) outfit that helps Reserve Component (RC) personnel with problems of this nature. (The ESGR toll-free number is 800-336-4590.) ESGR headquarters put me in touch with a volunteer ombudsman in my city, and the ombudsman contacted DWI on my behalf. The DWI personnel office told the ombudsman to contact the General Counsel (GC) of the company, and the GC told the ombudsman to "pound sand."

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 928 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 104 articles so far in 2013.

After ESGR told me that they could not help me, I contacted the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency seemed to take forever to get around to my case. When they finally did, they took the word of the DWI GC at face value, about the facts and the law, and closed my case as "without merit." I could have insisted that DOL-VETS refer my case to the United States Department of Justice (DOJ), but I figured that would be a waste of time—that it would be most unlikely that DOJ would agree to take my case after DOL-VETS gave the case a "negative referral."

I searched for months trying to find a lawyer willing to take my case on a contingent fee basis, where the lawyer gets a percentage of my recovery. Several lawyers I talked to were unwilling to take the case because of the negative DOL-VETS assessment. I finally found a lawyer after I contacted you and the Service Members Law Center (SMLC), and you referred a lawyer to me.

My lawyer filed suit against DWI shortly after I retained her. We have been through a drawn-out discovery process. The DWI lawyer got to take my deposition, and my lawyer got to take depositions from several DWI officials, including my direct supervisor and the personnel director. The judge has pushed me and DWI to settle, but DWI has been unwilling to offer more than a few thousand dollars. Finally, with the discovery process over and the trial date approaching, DWI has offered me $100,000 in "full and final" satisfaction of my USERRA and other potential claims. The settlement agreement that I have been offered does not include reinstatement at DWI, and I would be required to agree never to apply for any DWI job.

My lawyer tells me that DWI is unlikely to offer anything more. I either accept this offer or proceed to trial. What do you think of the offer?

After I applied for reemployment and was denied in August 2009, I diligently sought another job, but the unemployment rate was very high in my city, and in my field, and I searched for a job unsuccessfully for a whole year, until August 2010, when I went back on active duty (voluntarily) for a year, until August 2011. I spent most of that year in Afghanistan. In my unit during that time, I saw one Soldier killed and three seriously wounded, but fortunately I returned home unscathed.

When I was released from active duty again, in August 2011, I sent a letter to the DWI personnel office, again seeking reemployment or employment at DWI. The company did not respond to my letter. When I sought an appointment, the personnel office refused to meet with me and refused me admittance to the DWI facility.

When I was called to active duty in August 2007, I was making $1,500 per week or $78,000 per year at DWI. I worked straight 40-hour weeks and almost never was required to or given the opportunity to work overtime.

It has been four years since I returned from the 2007-09 active duty period. Four times $78,000 is $312,000. During the last four years (August 2009 to August 2013), I have earned $200,000. Most of that $200,000 is for my military salary, hazardous duty pay, and allowances that I

received during the year (August 2010 to August 2011) that I was back on active duty and deployed to Afghanistan. The $200,000 mitigation figure also includes drill pay for my National Guard weekend drills, when I was not on active duty, and it includes unemployment compensation that I received during the year from August 2009 to August 2010.

In June 2013, almost four years after I returned from the pertinent active duty period, I finally found a full-time civilian job, at the ABC Corporation. At ABC, I am paid $1154 per week ($60,000 per year) for a straight 40-hour week. At ABC, there are a lot of overtime opportunities, and I have availed myself of those opportunities as I am trying to catch up financially. There are some weeks at ABC when I make more than the $1500 per week that I had been making at DWI, but it is only through working a lot of overtime.

If I had continued working at DWI from August 2009 through August 2013, I would have earned $312,000. I have in fact earned $200,000 during that time period. The difference is $112,000. DWI has offered me $100,000. That is a pretty good offer, right?

A: Wrong. Your arithmetic is far too simplistic, and you are probably entitled to a lot more than $112,000. Before we can intelligently judge the sufficiency of the $100,000 settlement offer, let us first figure what you might get under USERRA if you litigate the case and win. Of course, a settlement will be less, but it should not be an order of magnitude less.

Let us assume that you go to trial and establish that you were entitled to reemployment in August 2009 because you met the five eligibility criteria at that time. Section 4323(d)(1) of USERRA establishes the remedies that a federal district court can award to the successful USERRA plaintiff:

**"(1)** In any action under this section, the court may award relief as follows:
**(A)** The court may require the employer to comply with the provisions of this chapter.
**(B)** The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
**(C)** The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful."

38 U.S.C. § 4323(d)(1).

At the time you were called to the colors in August 2007, you were earning $1500 per week or $78,000 per year. If you had not been called to the colors in 2007, you most likely would have received pay raises (based on cost of living and/or seniority) in 2008 and 2009. Upon reemployment in August 2009, you were most likely entitled to substantially more than $1500 per week, the amount you were making in 2007. Similarly, if you had remained continuously employed you most likely would have received additional pay raises in subsequent years.

We need to determine what you *would have earned* at DWI if you had been promptly and properly reemployed in August 2009, as you were entitled to be under USERRA. In the ongoing discovery process, you need to identify DWI employees who were hired about the same time that you were hired, in 1999, and who have been working in positions similar to the DWI position that you held until you entered active duty in August 2007. What pay raises have they received in the last six years? When we compute properly what you *would have earned* at DWI in the 48-month period from August 2009 to August 2013 if you had been properly reemployed, we may find that the figure is substantially more than $312,000.

Next, it should be noted that back pay (what you would have earned minus what you did earn in your mitigating employment) is to be computed on a *pay period by pay period basis. Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348 (8th Cir. 1983). During the year that you were back on active duty and in Afghanistan (August 2010 to August 2011), you probably earned substantially more from the Army than you would have earned at DWI. Thus, you are probably not entitled to back pay *for that period,*[2] but the difference is not applied to earlier or later pay periods. This principle makes a big difference in computing the back pay and the mitigation.

Next, in computing the mitigation to be subtracted from what you *would have earned* at DWI if the company had obeyed the law, we must look only at *comparable hours* in the mitigating employment. *See Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365 (5th Cir. 1971).

In your mitigating job at ABC Corporation, after June 2013, you are working a lot of overtime. In your job at DWI, you almost never worked overtime. The lawbreaking employer (DWI) must not benefit from this extra work you have performed, over and above the hours you would have worked at DWI if the company had obeyed the law. Your overtime earnings at ABC need to be factored out of the computation of mitigation.

That same important principle needs to be applied to your substantial earnings from the Army during the period (August 2010 to August 2011) when you were back on active duty and deployed to Afghanistan. During that time, you were working far more than 40 hours per week—junior officers in combat zones typically work 100 hours per week or more. More importantly, you were facing enormous risks in combat, many orders of magnitude beyond the minimal risks that you faced when you worked at DWI. Only a small portion of your Army earnings (maybe 20%) should be treated as mitigation for purposes of determining what DWI owes you.

Your Army National Guard drill pay, during the time since August 2009 when you have not been on active duty, should not be counted as mitigation of the back pay that DWI owes you. When you were working at DWI, you were working Monday-Friday 40-hour weeks. Your Army National Guard drills were on weekends. While you were working at DWI, your drill pay was *in*

[2] But please see the discussion below about all the extra hours you worked and all the extra risks you took while you were on active duty in Afghanistan.

*addition to* and not instead of your DWI pay. Thus, the drill pay should not be subtracted from DWI's back pay liability.

The unemployment compensation (UC) that you received from the state during the period of August 2009 to August 2010 should not be deducted from DWI's back pay liability, because the state is a collateral source. *See National Labor Relations Board v. Gullett Gin Co.,* 340 U.S. 361, 364-65 (1951); *Niemann v. Alpine-Brook-Triangle Corp.,* 69 Labor Cases Par. 12940 (S.D.N.Y. 1972).

You should also remember that under the pending settlement offer you will not be returning to work at DWI. Your week-to-week pay at ABC, in the job you started in June 2013, is still substantially less than what you *would have been earning* at DWI if the company had complied with the law. You need to recognize that DWI also needs to compensate you for *front pay* if the settlement means that you are not returning to work at DWI.

You also need to consider *health insurance and pension benefits.* During the time that you were employed by DWI, from 1999 to 2007, you had health insurance for yourself and your family, as part of your DWI compensation. After DWI unlawfully denied you reemployment in August 2009, you found it necessary to purchase health insurance coverage on the open market, at considerable out-of-pocket expense. That expense is certainly compensable under section 4323(d)(2) of USERRA, 38 U.S.C. § 4323(d)(2).

You were entitled to reemployment at DWI in August 2009. Under section 4318 of USERRA, 38 U.S.C. § 4318, you were also entitled to be treated *as if you had been continuously employed* at DWI, for pension purposes. If DWI had obeyed the law, you would now have *14 years of DWI pension credit* (1999-2013). If you are giving up all your rights at DWI, the cash payment should take into account the valuable rights that you are giving up.

You are also entitled to prejudgment interest on all of these awards. *See Hembree v. Georgia Power Co.,* 637 F.2d 423, 429-30 (5th Cir. 1981). In the years since 2008, interest rates have been so low that prejudgment interest is hardly worth arguing about, but interest rates will return to historically normal levels when the Federal Reserve ends its current monetary policy.

Q: I think that DWI has basically flouted USERRA. They knowingly violated the law, just because they thought they could get away with it. Does USERRA provide for punitive damages?

A: No, but section 4323(d)(3) provides for *liquidated damages,* in the amount of the actual damages and in addition to those damages, if you prove that the employer violated the law *willfully*. For example, if you prove $200,000 in actual damages and you prove willfulness, you get $400,000.

This sounds like one of those cases where liquidated damages could well be appropriate. The possibility of liquidated damages should affect the settlement value of this case.

Q: DWI is a major defense contractor. How can a defense contractor flout the rights of those who serve our country in uniform? Does DWI's status as a defense contractor affect the settlement value?

A: From a strictly legal point of view, no. Defense contractors have no additional obligations under USERRA, but neither are they exempt from USERRA. USERRA applies to almost all employers in this country.[3] Private employers are obligated to follow USERRA regardless of whether they do business with the Federal Government.

As a practical matter, DWI's status as a major defense contractor is relevant in determining the settlement value of this case. I am sure that DWI is afraid of bad publicity that is likely to ensue if the company is found to have violated USERRA, and especially if the company is found to have violated the law willfully.

Q: How do I evaluate a settlement offer?

A: First, remember the old adage that "a bird in hand is worth two in the bush." Your case seems very strong, but there is always a possibility of failure of proof. And a company can lose a substantial judgment and then use bankruptcy to get out from under the obligation to pay it. Money in hand, that you can invest in safe and diversified investments, is always better than the *possibility* of collecting money or even the *promise* to pay you money.

Good luck, and please let me know how this case turns out.

[3] Only religious institutions (on First Amendment grounds), Indian tribes (on residual sovereignty grounds), and foreign embassies and consulates and international organizations like the United Nations and the World Bank (on diplomatic immunity grounds) are exempt from USERRA enforcement.