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Do I have to work on my day off—Part 2

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Q: I am a deputy sheriff in a major metropolitan county, and I am also a second lieutenant in the Army Reserve. I participate in Army Reserve training on the second weekend of each month, and I have given my supervisor and the personnel office my schedule for the entire fiscal year, as you have suggested in Law Reviews 5 and 91.

As a deputy sheriff, I work most weekends, and my days off are mostly on Wednesdays and Thursdays. Because I have given my supervisor lots of advance notice about my drill schedule, he has rearranged my work schedule around my drill weekends. For example, I was scheduled to work at the sheriff's department on the weekend of June 12–13, 2004, but I was also scheduled to drill that weekend. I was scheduled to have off the following Wednesday and Thursday, June 16-17. Because I was performing Army Reserve drills on June 12-13, the supervisor changed my "days off" to those days. But I wasn't off at all, I was at my Army Reserve drills.

The way I see it, I was deprived of two days off that I otherwise would have had (June 16-17), because I performed military training on June 12-13. I feel that I have been discriminated against.

I printed out a copy of your Law Review 103 ("Do I Have To Work On My Day Off?") and provided it to my supervisor, and he promised to pass the article "up the chain." Last week, I received a letter from the county attorney, telling me that Law Review 103 is wrong and that the county's policy is not unlawful under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The county attorney cited Rumsey v. New York State Department of Corrections, 19 F.3d 83 (2nd Cir. 1994). What do you think?

A: I have read Rumsey, the case cited by the county attorney. I note that this is not a USERRA case. The Rumsey court was applying USERRA's predecessor, which was called the Veterans' Reemployment Rights (VRR) law. I invite your attention to Law Reviews 89 and 104, concerning the history of the re-employment statute and the effective date of USERRA. USERRA was enacted (signed into law by President Clinton) on October 13, 1994. It went into effect 60 days later, on December 12, 1994.

Under the USERRA transition rules, USERRA applies to "reemployments initiated" on or after December 12, 1994. If you completed your period of service and applied for re-employment with your pre-service employer before that date, the VRR law (not USERRA) applies to your case. USERRA is codified at 38 U.S.C. 4301-4336. The VRR law was formerly codified at 38 U.S.C. 2021-2026.

Rumsey was decided nine months before USERRA's effective date. More pertinently, the case was filed in the Federal District Court in 1982, 12 years before USERRA, and the underlying facts go back even further. In his famous soliloquy contemplating suicide ("To be, or not to be. That is the question."), Hamlet complained about, among many other things, "the law's delays."

In Rumsey, the court was applying the VRR law's anti-discrimination provision: "Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." [38 U.S.C. 2021(b)(3) (1988) (emphasis supplied).]

The corresponding section of USERRA is much broader: "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." [38 U.S.C. 4311(a) (emphasis supplied).]

The VRR law did not define any of its terms, so it is difficult to determine exactly what Congress meant by an "incident or advantage of employment." On the other hand, USERRA defines 16 terms, including "benefit of employment." That definition specifically includes "the opportunity to select work hours and location of employment." [38 U.S.C. 4303(2) (emphasis supplied).]

I think that this definition clearly shows that Rumsey is no longer good law, if it ever was, and that making you work on a day that you otherwise would have had off because you have performed military training is a violation of USERRA. I also invite your attention to *Rogers v. City of San Antonio*, 211 F. Supp. 2d 829 (W.D. Tex. 2002). Rogers struck down as unlawful a San Antonio police department policy remarkably similar to the sheriff's department policy that you describe.

*Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at samwright50@yahoo.com.