

Statute of Limitations and the NYPD Class Action USERRA Lawsuit

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[About Sam Wright](#)

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Q: I am a Chief Petty Officer (E-7) in the Coast Guard Reserve. I joined ROA recently after you amended your constitution to permit petty officers and noncommissioned officers to join.

I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other military-related laws.¹ I am

¹I 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.

²BA 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 (VRRRA—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 VRRRA 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 VRRRA 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.

particularly interested in Law Review 13090 (July 2013), titled “DOJ and NYPD Settle USERRA Class Action Lawsuit.”

At the age of 19, in July 1983, I joined the NYPD (New York Police Department) as a police officer. I retired 20 years later, in July 2003. My NYPD career was interrupted several times by voluntary and involuntary periods of Coast Guard active duty. One of those active duty periods occurred during my final three years on the NYPD, from July 2000 to July 2003. I was called to active duty in September 2001, immediately after the 9/11 terrorist attacks, and I remained on active duty until September 2002.

My NYPD pension is based on a formula, and part of the formula is my “high three” years of NYPD compensation. Like most NYPD officers, my high three years of compensation are the final three years. I only recently became aware, from reading your Law Review 13090 and other articles, that the NYPD was required to treat me *as if I had been continuously employed by the NYPD* during my year of active duty from September 2001 to September 2002, for purposes of computing my NYPD pension.

In computing my high three years of NYPD compensation, for the period from July 2000 to July 2003, the NYPD gave me credit for the *base pay only* that I would have earned from the NYPD between September 2001 and September 2002, when I was away from my civilian job for active duty. As a result of reading your articles, I now understand that the NYPD also should have credited me for the overtime pay and night differential pay that I would have received between September 2001 and September 2002, in computing my NYPD monthly pension checks starting in July 2003.

Including the overtime in the computation makes a huge difference in my case. In the weeks immediately following the 9/11 terrorist attacks, all NYPD officers were required to work hundreds of hours of overtime. Many of them were “working the pile”—referring to the pile of rubble and human remains where the World Trade Center twin towers had been. Other NYPD officers worked overtime to cover for NYPD officers who were away from their regular NYPD assignments to work the pile. I missed all of this overtime because I was on active duty from September 2001 to September 2002.

After I became aware of the class action lawsuit against the NYPD, brought by the United States Department of Justice (DOJ), I contacted the Office of the United States Attorney for the Southern District of New York, here in Manhattan, as you recommended in your articles. The United States Attorney’s Office sent me a bunch of paperwork, which I completed very carefully, and I provided all the requested documentation. Now, they are telling me that I am not in the “class” that is included in this class action settlement and that I will not benefit from the settlement. What gives?

The paperwork that the U.S. Attorney sent me includes the following confusing paragraph:

"If you received your first pension check before October 10, 2004 you may ignore this form. If you want to be considered to be a Class Member and received your first pension benefit payment before October 10, 2004, then you must have been deployed to active duty after your retirement, and the number of days spent on those deployments in total must be greater than or equal to the number of days between the date you received your first pension benefit payment and October 10, 2004."

I was on active duty for a year, from May 2011 to May 2012, and I provided documentation of that active duty to the United States Attorney's Office. The Office told me that this period of service is irrelevant because it was after October 10, 2008. What difference does that make? What is magic about the date October 10, 2008? And why is the date October 10, 2004 significant?

A: This gets complicated, so please bear with me. You don't have to attend law school for three years to understand this stuff, but it helps.

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 (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men (including my late father) for World War II. Neither the VRRRA nor USERRA has ever had a statute of limitations. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress amended the VRRRA, adding a provision making clear

that state statutes of limitations were not to be applied in reemployment rights cases. That provision was carried over into USERRA in 1994.

A statute of limitations is a rule to the effect that a lawsuit about a cause of action must be filed within a specific time after the cause of action accrues, or the claim is time-barred. For example, in the District of Columbia the statute of limitations for personal injury claims is three years. Let us say that today I am crossing Constitution Avenue here in front of ROA headquarters, with the walk light. You are driving east on Constitution Avenue and not paying attention, and you run over me in the crosswalk, causing me grievous injuries. I wait three years and one day before suing you in the District of Columbia Superior Court. My lawsuit will be dismissed because it was filed one day after the expiration of the statute of limitations. It does not matter how grievous my injuries are or how overwhelming is my evidence that you were at fault for the accident. I failed to file the lawsuit before the statute of limitations expired, and my lawsuit is time-barred.

In 1990, Congress enacted a four-year default statute of limitations, for causes of action under laws enacted by Congress after December 1, 1990, if the specific federal law does not have a statute of limitations. Here is the text of that federal statute:

“(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [enacted December 1, 1990] may not be commenced later than 4 years after the cause of action accrues.”

Title 28, United States Code, section 1658(a) [28 U.S.C. 1658(a)].

On October 10, 2008, President Bush signed into law the Veterans’ Benefits Improvement Act of 2008. Section 311(f) of that law enacted a new section of USERRA—section 4327, or 38 U.S.C. 4327. Section 4327(b) of USERRA now provides as follows: “If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA] alleging a violation of this chapter, *there shall be no limit on the period for filing the complaint or claim.*” 38 U.S.C. 4327(b) (emphasis supplied).

With the enactment of section 4327(b), it is now clear that there is no statute of limitations for USERRA causes of action that accrued on or after October 10, 2008. How does section 4327(b) apply (if at all) to causes of action that accrued *before* October 10, 2008? The United States Court of Appeals for the Seventh Circuit³ has held that the enactment of section 4327(b) in 2008 did not “resurrect” USERRA claims that were already “dead” on October 10, 2008. *Middleton v. City of Chicago*, 578 F.3d 655, 662-65 (7th Cir. 2009).⁴

On the other hand, if a cause of action was not “dead” on October 10, 2008, because it accrued on or after October 10, 2004, the enactment of section 4327(b) extended the life of that cause of action indefinitely.

Your USERRA cause of action accrued in July or August of 2003, when you received the first insufficient NYPD pension check. Under the four-year default statute of limitations that was in effect at the time, your cause of action died in July or August of 2007, prior to the enactment of section 4327(b) on October 10, 2008. Thus, your cause of action is time-barred, and you will not benefit from the settlement of the class action lawsuit that DOJ brought against the NYPD. That is what the United States Attorney’s Office is telling you, and I think that they are probably correct, unfortunately.

Q: What is special or relevant about active duty that I performed prior to October 10, 2008?

A: Active duty that you performed between July 2003, when you retired from the NYPD, and October 10, 2008 (when Congress enacted section 4327(b)) is relevant because of a provision of the Servicemembers Civil Relief Act (SCRA). That provision reads as follows:

³The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

⁴The citation means that you can find the *Middleton* case in Volume 578 of *Federal Reporter Third Series* starting on page 655. The specific discussion of the statute of limitations issue can be found on page 662—65. I discuss the *Middleton* case in detail in Law Review 0948 (September 2009).

“The period of a servicemember’s military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember’s heirs, executors, administrators, or assigns.”

50 U.S.C. App. 526(a).

Section 526(a) means that the four-year statute of limitations was tolled (stopped running) during a period of active duty. For example, let us assume that you were on active duty in the Coast Guard for two years, from October 2005 to October 2007. In that case, your USERRA cause of action was not dead on October 10, 2008, when Congress enacted section 4327(b), and your claim would still be viable. Your active duty in 2010-11 is irrelevant because it has no bearing on the question of whether you still had a live USERRA claim on October 10, 2008.

Q: This is not fair! I had never heard of this issue until 2013, when I read your “Law Review” articles about the DOJ lawsuit against the NYPD. I was not aware of this legal gobbledygook and my claim should not be barred.

A: Unfortunately, I do not have the power to turn back the hands of time and give you this information in July 2003, when you really needed it. You are the unfortunate victim of the legal principle of “you snooze, you lose.” If you sleep on your rights, you will likely find that you have no enforceable rights when you wake up. “But I did not know” is not a basis for an exemption from the statute of limitations.

Reserve Component members need this critical information about USERRA and other laws *at a time when they can use that information*. That explains why ROA established the Service Members Law Center (SMLC) in June 2009, with me as the first Director. I invite your attention to www.servicemembers-lawcenter.org. You will find more than 1000 “Law Review” articles about USERRA, the SCRA, and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

As the SMLC Director, I am here at the ROA headquarters answering calls and e-mails during regular business hours Monday-Friday, and also until 10 pm Eastern on Mondays and Thursdays. In 2013, I received and responded to 9,193 inquiries, or 766 per month on average. Almost half of the inquiries were about USERRA, and the other half were about everything you can think of that has something to do with military service and law.

The point of the evening availability is to encourage Reserve and National Guard personnel to call me or e-mail me from the privacy of their own homes, outside their civilian work hours. You have no reasonable expectation of privacy when you are using the employer’s telephone, computer, or time to inquire about your rights with respect to that employer. Moreover, if the

employer is annoyed with you because you have been called to the colors five times since the 9/11 terrorist attacks and expect to be called up again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

ROA is unique in providing this after-hours service. Neither the Department of Labor nor Employer Support of the Guard & Reserve nor any other government agency or military association gives service members the opportunity to speak to a live human (to say nothing of an expert attorney) after 5 pm.

Update – March 2022⁵

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.⁶ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant section cited throughout the article can be found at:

50 U.S.C. App. § 526 discussing the statute of limitations can be found at 50 U.S.C. § 3936.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁷

Please join or support ROA

This article is one of 2,300-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

⁵Update by Second Lieutenant Lauren Walker, USMC.

⁶*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-skra> (last visited Mar. 10, 2022).

⁷Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s eight⁸ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE

⁸Congress recently established the United States Space Force as the 8th uniformed service.