

LAW REVIEW 15039¹

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**Federal Law Protects Students Called to the Colors during a Semester,
But it Does not Help the Student who Must Miss a few Days for
Drills or Annual Training**

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.2.4—Students

1.2—USERRA forbids discrimination

1.8—Relationship between USERRA and other laws/policies

Q: I am a second class petty officer (E-5) in the Navy Reserve, serving as a corpsman. I am a full-time student, studying to be an angiography technician. I have resigned my civilian job in order to devote my full attention to my studies, but I must maintain my Navy Reserve participation in order to maintain my educational benefits, which I am using to pay the tuition. I have missed only a handful of days of school work, and only for my Navy Reserve drill weekends and annual training, but the dean and two of my professors have given me a hard time about these missed days. The dean put me on probation and told me that if I miss one more day I will be expelled.

At the Naval Operational Support Center, I saw a poster for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and I called that organization's toll-free number (800-336-4590). An employee at ESGR told me "sorry, we cannot help you" and referred me to you and the Service Members Law Center (SMLC). Why can't ESGR help me with this problem?

After ESGR referred me to you, I looked up your website at www.servicemember-lawcenter.org and read several excellent articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does USERRA require my college to accommodate the handful of days that I must miss because of my Navy Reserve drills and annual training?

A: DOD created ESGR in 1972, in anticipation of the 1973 abolition of the draft and establishment of the all-volunteer military. Under its charter, ESGR's mission is to gain and

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

² Captain Wright served as the Director of ROA's Service Members Law Center for six years, from June 2009 to May 2015.

maintain the support of *civilian employers* for the men and women of the National Guard and Reserve. The college is not your civilian employer, and your problem is outside of ESGR's mission statement.

USERRA accords the right to reemployment to a person who leaves a *civilian job* (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services (active duty, active duty for training, inactive duty training, funeral honors duty, etc.). USERRA does not apply to the relationship between a student and an educational institution, because the educational institution is not the student's *employer*.

In 2008 Congress enacted a law giving students USERRA-like protections when their educational programs are interrupted by voluntary or involuntary service. Congress codified that provision in title 20 of the United States Code, section [1091c](#) (20 U.S.C. 1091c). The United States Department of Education (Education) is charged with enforcing this provision, and Education promulgated regulations which can be found in [title 34 of the Code of Federal Regulations, at section 668.18 \(34 C.F.R. 668.18\).](#)

I invite your attention to Law Review 15038 (the immediately preceding article in this series) by Commander Wayne L. Johnson, JAGC, USN (Ret.). In his article, Commander Johnson explains in considerable detail section 1091c and the Education regulations promulgated to carry out this law. Near the end of his article, Commander Johnson states:

This federal law provides excellent protection for the student who is interrupting an educational program for voluntary or involuntary uniformed service. The law does not help the National Guard or Reserve member who is trying to complete this semester, despite having an obligation to perform inactive duty training or active duty training during the semester. The student will never complete the educational program if each semester is interrupted by such military training requirements. Most (or at least many) professors are willing to make accommodations for these circumstances, but no federal law requires them to do so. In these situations, the reserve components will also need to show some flexibility.

Your rights under 20 U.S.C. 1091c are *a floor and not a ceiling* on your rights as a student who is actively participating as a member of a Reserve Component of the armed forces. A state law cannot take away your rights under federal law, but a state law can give you *greater or additional rights*.³ Fortunately, Texas law gives you important protections, over and above your rights under federal law.⁴ The Texas law refers to "active military service" and perhaps this language can be construed to include drills and annual training. Here is the pertinent Texas regulation:

Texas Title 19: Education (PART 1; CHAPTER 4; SUBCHAPTER A; RULE §4.9)

³ In the employment context, USERRA supersedes a state law that purports to limit USERRA rights but does not supersede a state law that provides greater or additional rights. See 38 U.S.C. 4302.

⁴ Thank you to Commander Wayne L. Johnson, JAGC, USN (Ret.) for bringing this provision to my attention.

SECTION 4.9. Excused Absence for a Person Called to Active Military Service [\[Section\]](#)

Latest version.

- (a) Upon notice from a student required to participate in active military service, an institution shall excuse a student from attending classes or engaging in other required activities, including examinations.
- (b) A student shall not be penalized for an absence which is excused under this subsection and shall be allowed to complete an assignment or take an examination from which the student is excused within a reasonable time after the absence.
- (c) Each institution shall adopt a policy under this subsection which includes:
 - (1) the retention of a student's course work completed during the portion of the course prior to the student being called to active military service;
 - (2) the course syllabus or other instructional plan, so that the student will be able to complete the course without prejudice and under the same course requirements that were in effect when the student enrolled in the course;
 - (3) a definition of a reasonable time after the absence for the completion of assignments and examinations;
 - (4) procedures for failure of a student to satisfactorily complete the assignment or examination within a reasonable time after the absence; and
 - (5) an institutional dispute resolution process regarding the policy.
- (d) The maximum period for which a student may be excused under this section shall be no more than 25% (twenty-five percent) of the total number of class meetings or the contact hour equivalent (not including the final examination period) for the specific course or courses in which the student is currently enrolled at the beginning of the period of active military service.
- (e) Institutions are directed to develop and publish policies and procedures to ensure that students enrolled in distance learning, self-paced, correspondence, and other asynchronous courses receive equivalent consideration for the purposes of determining acceptable duration of excused absences and time limits for the completion of course work following an excused absence under this section.

Source Note: The provisions of this §4.9 adopted to be effective November 22, 2005, 30 TexReg 7725

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I have brought your situation to the attention of a retired Navy judge advocate in Texas, and I hope that he can help you in this matter.

Q: While pressuring me to quit the Navy Reserve, the dean told me that I must get out of the reserves because no civilian hospital will tolerate an angiography technician serving in the Reserve or National Guard. What do you think of that?

A: I invite your attention to *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). This is a decision of the United States Supreme Court. The citation means that you can find the decision in Volume 562 of *United States Reports*, and the decision starts on page 411.

Vincent Staub, an Army Reservist, was fired by Proctor Hospital. He sued the hospital in the United States District Court for the Central District of Illinois and won a jury verdict. He proved to the satisfaction of the jury that the firing was motivated by his supervisors' annoyance with him for the work days he missed because of his Army Reserve obligations. The hospital appealed to the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The 7th Circuit reversed Staub's victory. Staub appealed to the Supreme Court and won, in an important 8-0 decision. I invite your attention to Law Review 1122 for a detailed discussion of the *Staub* case.

There have been 17 Supreme Court cases on the reemployment statute since it was enacted in 1940.⁵ The last two cases have dealt with hospitals, as employers of Reserve Component members. I am referring to *Staub* and *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991).⁶

Please do not get into an argument with the dean or anyone else about your USERRA rights with potential civilian employers, after you complete this educational program. For now, you need to devote your full attention to your studies. Good luck.

UPDATE March 2019

Please see Law Review 19027 (March 2019) for new information on this topic.

⁵ Please see Category 10.1 in our Subject Index for a case note on each of these 17 decisions.

⁶ I discuss *King* in detail in Law Review 0929.