

You Must Apply for Reemployment—Part 4

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

1.3.1.3—Timely application for reemployment

Q: I am a Major in the Army Reserve and I recently completed a period (not entirely continuous) of four years of active duty, from April 2011 to April 2015. I went to work for a large corporation (let's call it Daddy Warbucks International or DWI) in January 2006 and left in April 2011 for five months of active duty, through September 2011. I gave prior oral and written notice to my immediate DWI supervisor and to the DWI personnel office.

My initial orders expired September 30, 2011. Instead of returning to DWI, I sought follow-on orders from the Army. I received new orders on October 15, 2011, running through September 30, 2012. I again sought new Army orders, and my next set of orders ran from November 1, 2012 to September 30, 2013. I again sought new orders but did not receive them until March 2014. I did not communicate with DWI during the interim between April 2011 (when I left my job for service) and May 1, 2015 (when I applied for reemployment).

My March 2014 orders ran until September 30, 2014. On October 1, the Army gave me a new set of orders running through April 30, 2015. The Army personnel office told me that it was unlikely that my orders would be extended again, so I applied for reemployment at DWI on May 1, 2015.

The DWI personnel office demanded that I provide documentation about my military service between April 2011 and April 2015, and I provided a copy of my orders and my DD-214s. The personnel director told me that I am not entitled to reemployment because I did not apply for reemployment between September 2013 (when my orders expired) and March 2014 (when I started a new period of active duty).

What gives? The way that I read your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), I am entitled to reemployment so long as I have not been away from my civilian job for five years or more.

¹ Please see 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.

² Captain Wright was the Director of ROA’s Service Members Law Center from June 2009 to May 2015.

A: Unfortunately, you are not entitled to reemployment because you failed to meet one of the five USERRA conditions—you failed to make a timely application for reemployment at DWI in late 2013. As I have explained in Law Review 1281 and other articles, you (or any service member) must meet five conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that you did this in April 2011.
- b. Must have given the employer prior oral or written notice. It seems clear that you gave notice before you went on active duty in April 2011. You were not required to give DWI notice of the various extensions, but I certainly would have recommended that you do so if you had contacted me at the time.³
- c. Must not have exceeded the *cumulative* five-year limit on the duration of the period *or periods* of uniformed service, relating to the employer relationship for which you seek reemployment.⁴
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military. It is clear that you meet this criterion.
- e. Must have made a *timely application for reemployment*.

After a period of service of 181 days or more, you have 90 days to apply for reemployment.⁵ You were released from active duty on September 30, 2013. The 90-day deadline to apply for reemployment at DWI expired on December 29, 2013. Because you did not apply for reemployment or begin a new period of uniformed service by that date, you do not have the right to reemployment.

Note: I have written this article as a lesson for readers. If you want to exercise your USERRA rights, you must meet the eligibility criteria. I strongly suggest that you dot the i's and cross the t's. It is your job on the line, and it is incumbent on you to understand the rules and then comply. It is a continuing frustration to me when I hear from an individual who has messed up irretrievably. If this person had contacted me in late 2013, before his 90-day deadline ran out, I could have helped him, but he waited until 17 months later to contact me. I do not have the power to turn back the hands of time.

For the last six years (June 2009 through May 2015), I have been the Director of the Service Members Law Center (SMLC) at the Reserve Officers Association (ROA). I have been available by telephone and e-mail during regular business hours on weekdays and until 10 pm Eastern on

³ Please see Law Review 13054 (April 2013), footnote 7.

⁴ For purposes of this article, I shall assume that you did not exceed the five-year limit with respect to your employer relationship with DWI, but to be sure that you were within the limit we would need to go back to January 2006 (when you began your employment at DWI) in computing how much of the five-year limit you have used and how much head room you have left. In this case, the five-year limit is moot, because you clearly do not meet one of the other conditions for reemployment.

⁵ 38 U.S.C. 4312(e)(1)(D).

Mondays and Thursdays. I have received and responded to more than 35,000 inquiries, by e-mail and telephone, and more than half of them are about USERRA.

Unfortunately, it is now necessary for ROA to suspend the operation of the SMLC, effective May 31, 2015, at least temporarily. We will continue the 1,300 "Law Review" articles at www.servicemembers-lawcenter.org and we may continue to add articles, although probably not at the pace that we have been adding them. After May 31, we will no longer be able to offer the service of receiving and responding to telephone and e-mail inquiries about USERRA and other military-relevant statutes.

Jeffrey E. Phillips, ROA's Executive Director, has placed the following notice at www.servicemembers-lawcenter.org:

Effective May 31, 2015

For the time being, ROA will not be providing service members legal information nor operating the Service Members Law Center. ROA recognizes the need for this information and will continue to provide from its website archived legal reviews, which continue to be of value. From time to time, ROA may issue new reviews. For inquiries please contact Jeffrey Phillips at jphillips@roa.org .