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You Must Apply for Reemployment—Part 7

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Q: I graduated from high school in 2004 and went to work for a janitorial service shortly thereafter. In 2006, I visited a Coast Guard recruiter and enlisted. I enlisted in the regular Coast Guard, not the Coast Guard Reserve. In May 2006, I told the owner of the company that I had enlisted and would be reporting to "boot camp" on July 1 of that year. I also told him that I planned to make the Coast Guard my career and that I would not be returning to the company. I reported to active duty on July 1, as ordered.

My original plan was to remain on active duty for 20 years or more, but things change. I served honorably and left active duty on June 30, 2010, exactly four years later. I returned home and looked for a job, without success, through July, August, and half of September. On September 15, 2010, I showed up at the office of the janitorial service and said that I wanted to return to the job that I had held from 2004 to 2006, before I left to join the Coast Guard. The office is "high security" and I was unable to obtain entrance. A clerk at the office passed me a job application through the window. This was the standard employment application

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[1] We 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.

[2] Captain Wright was the Director of ROA's Service Members Law Center (SMLC) as a full-time employee of ROA from June 2009 through May 2015. During that time, he received and responded to more than 35,000 e-mail and telephone inquiries. About half of the inquiries were about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the other half were about everything you can think of that has something to do with military service and law. Captain Wright is no longer employed by ROA, as of 31 May 2015, but he is continuing the SMLC as a part-time volunteer effort, as a member of ROA. He is available at ROA headquarters, to answer telephone calls and e-mails, on Wednesday and Thursday evenings and occasionally on weekends. You can reach Captain Wright by telephone at (800) 809-9448, ext. 730, or by e-mail at SWright@roa.org. Please understand that Captain Wright is a volunteer and will not necessarily be able to respond to your e-mail or telephone call on the same day.

form, not a form for applying for reemployment after military service. I completed the form and passed it back to the clerk, through the window. On my completed form, I included in the "remarks" section that I had worked for the company before and was returning from the Coast Guard and wanted to return to my job. I did not mention any federal law, and at the time I was only vaguely aware (if at all) that I might have the right to reemployment under federal law. The clerk told me "we have no vacancies" and "don't call us; we will call you if anything comes up." I never heard back from the company.

Four years later, in September 2014, I heard about a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA). I filed a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency investigated my complaint and found it to have merit. Upon my request, DOL-VETS referred my case file to the United States Department of Justice (DOJ). Just last week, DOJ sent me a form letter advising me that it would not represent me and that I might wish to retain private counsel. I called DOJ to ask for the basis of the denial of my request for representation, but DOJ refused to discuss the case with me, even informally by telephone, and refused to explain the rationale for turning me down.

In correspondence with DOL-VETS, the janitorial service owner's attorney insisted that I did not have the right to reemployment in September 2010 for the following reasons:

a. **I served in the Coast Guard, not the "real military," and USERRA only applies to the "real military."**
b. **I served in the regular Coast Guard, not the Coast Guard Reserve, and USERRA only applies to Reserve and National Guard service.**
c. **I waived my right to reemployment in June 2006, just before I left the job to report to boot camp, because I told the employer that I would be on active duty for 20 years or more and would not be returning to work for the janitorial company after my Coast Guard service.**
d. **I did not have the right to reemployment in September 2010 because I waited 75 days after leaving active duty to visit the company, because I completed a job application form rather than an application for reemployment, and because I did not cite federal law (USERRA) on my application and did not inform the company that federal law gave me the right to return to my job.**
e. **I did not have the right to reemployment in September 2010 because the company had no vacant position to offer me at that time.**
f. **I was not entitled to relief because I waited more than four years after September 2010 to complain to the Department of Labor (DOL) about the alleged USERRA violation.**

Do you think that I had the right to reemployment in September 2010? How do you suggest that I proceed?

A: I think that you met the five USERRA conditions in September 2010 and that you were entitled to reemployment.

As I have explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994.[3] USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA was the law that led to the drafting of millions of young men (including my late father) for World War II.

As I have explained in Law Review 1281 and other articles, you (or any service member) must meet five simple conditions to have the right to reemployment under USERRA:

a. You 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, as defined by USERRA.
b. You must have given the employer prior oral or written notice.
c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.
d. You must have been released from the period of service without having received a disqualifying bad discharge from your service.
e. After release from the period of service, you made a timely application for reemployment.

I think that it is clear that you met these five conditions in September 2010 and that you were entitled to reemployment.

You left your civilian job for the purpose of performing service in the uniformed services.

The employer has contended that the Coast Guard is not a "real service" and that you do not have the right to reemployment for that reason. This contention is clearly wrong.

Section 4303 of USERRA[4] defines 16 terms used in this law, including the term "uniformed services," which is defined as follows:

> The term "uniformed services" *means the Armed Forces,* the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.[5]

[3] USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-4335).
[4] 38 U.S.C. 4303.
[5] 38 U.S.C. 4303(16) (emphasis supplied).

USERRA does not define the term “Armed Forces,” but the term is defined in the definitions section of title 10, as follows:

> (4) The term "armed forces" means the Army, Navy, Air Force, Marine Corps, *and Coast Guard*.[6]

You clearly left your civilian position for the purpose of performing uniformed service, as defined by USERRA.

It matters not that you served in the regular Coast Guard, rather than the Coast Guard Reserve. USERRA and the VRRA have always applied to persons serving in the regular military, as well as the Reserve and National Guard.[7]

You gave sufficient prior notice to the employer, and your statement of intent to make the Coast Guard your career does not defeat your right to reemployment.

In June 2006, before you left your job to report to Coast Guard boot camp, you informed your civilian employer that you had enlisted in the military and that you were leaving your job for service. This met the requirement of giving prior notice. You were not required to predict that you would be returning to the civilian job, and your statement to the effect that you would not be returning did not defeat your right to reemployment when you were released from active duty and applied for reemployment four years later.

Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* September 20, 2004. After considering comments received and making a few adjustments, the Department of Labor (DOL) published in the December 29, 2005, *Federal Register* the final USERRA regulations. They took effect January 18, 2006. The regulations are published in Title 20, Code of Federal Regulations (CFR), Part 1002 (20 C.F.R. Part 1002). One section of the DOL regulations explains that the person leaving a job for service is not required to predict that he or she will be returning to the job after completion of service:

> § 1002.88 **Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?**
>
> No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. *Even if the employee tells the*

[6] 10 U.S.C. 101(a)(4) (emphasis supplied).
[7] Please see Law Review 0719 (May 2007).

> *employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.*[8]

This statement in the USERRA Regulations, to the effect that the service member is not required (upon giving notice of an impending period of uniformed service) to predict that he or she will return to the civilian employer and seek reemployment is buttressed by a paragraph in USERRA's 1994 legislative history:

> The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an "unburned bridge." Not until the individual's discharge or release from service and/or transportation back home, which triggers the application time, does the servicemember have to decide whether to recross that bridge. *See Fishgold, supra,* 328 U.S. at 284: "He is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life."[9]

You were entitled to change your mind about remaining on active duty in the Coast Guard for a career and about not returning to your pre-service civilian job. Your pre-service statement about not returning to work after service did not defeat your right to reemployment.

You did not exceed the five-year limit.

Under section 4312(c) of USERRA,[10] a service member's cumulative periods of service, relating to the employer relationship for which he or she seeks reemployment, must not have exceeded five years.[11] Your active duty service from July 1, 2006 through June 30, 2010 was well within the five-year limit. You clearly met this criterion.

You did not receive a disqualifying bad discharge from the Coast Guard.

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[8] 20 C.F.R. 1002.88 (bold question in original, emphasis by italics supplied).

[9] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2459 (report of the House Committee on Veterans Affairs) (hereinafter "1994 *USCCAN").*

[10] 38 U.S.C. 4312(c).

[11] There are nine exemptions—kinds of service that do not count toward exhausting an individual's five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count.

Under section 4304 of USERRA,[12] you are disqualified from reemployment if you received a punitive discharge by court martial,[13] or if you received an other-than-honorable administrative discharge, or if you were dismissed or dropped from the rolls of your service. It is clear that you served honorably and that you did not receive one of these disqualifying bad discharges.

After release from active duty, you made a timely and sufficient application for reemployment.

Because your period of active duty was more than 180 days, you had 90 days (starting on the date of release) to apply for reemployment.[14] Your application for reemployment on September 15, 2010 was timely.

Your application for reemployment was sufficient. You were not required to cite federal law or to use any particular form in applying for reemployment. The DOL USERRA Regulations emphasize the minimal requirements of the application for reemployment:

> § 1002.118 **Is an application for reemployment required to be in any particular form?**
>
> An application for reemployment need not follow any particular format. *The employee may apply orally or in writing*. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.[15]

Your application for reemployment was sufficient. If I had heard from you in September 2010, I would have urged you to make a formal application for reemployment by certified mail.[16] The purpose of such a written application would have been to avoid exactly the sort of misunderstanding that has occurred and to lay the groundwork for the awarding of double damages for a willful violation.

You were not required, when applying for reemployment in September 2010, to mention the name of the relevant federal statute (USERRA). It was the employer's obligation to be aware of or to find out about the company's legal obligations. Ignorance of the law is no excuse.

I explained in Law Review 120 that the VRR law did not give rulemaking authority to the Department of Labor (DOL), but DOL did publish a *VRR Handbook.* While employed as a DOL attorney, I co-edited the 1988 edition of that handbook, which replaced the 1970 edition. Several courts, including the Supreme Court, have accorded a "measure of weight" to the

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[12] 38 U.S.C. 4304.
[13] Such a discharge would be called a bad conduct discharge or a dishonorable discharge.
[14] 38 U.S.C. 4312(e)(1)(D).
[15] 20 C.F.R. 1002.118 (emphasis by italics supplied, bold question in original).
[16] Please see Law Review 15001 (January 2015) for a sample application for reemployment letter.

interpretations expressed in the *VRR Handbook*. *See Monroe v. Standard Oil Co.,* 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992); *Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers and Distributors Association,* 546 F.2d 314, 319 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977); *Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

The 1988 edition of the *VRR Handbook* states as follows on the requirements of an application for reemployment:

> The veteran need not return to work within 90 days, he must only make his application for reemployment within that time. After the application, the pre-service employer must reemploy the veteran within a reasonable time. What is reasonable depends upon the circumstances.
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> The request for reemployment may be made orally or in writing, expressly or by implication. No special form or procedure is required by law; however, the request should convey two elements in its message: (1) that the individual is a former employee; and (2) that he is now returning from service in the Armed Forces and is seeking reinstatement in employment. A mere inquiry about employment opportunities is not a valid application for reinstatement unless it somehow conveys the idea of a claim for reemployment.[17]

The *VRR Handbook* contains examples in each chapter that are illustrative of the requirements of the statute. Example 9 in Chapter 7 is remarkably similar to your situation:

> Veteran CD, an employee of Department Store S, completes two years of honorable military service on March 10, 1970, telephones the company's personnel office on March 20, 1970, and asks to speak with the Personnel Director. The personnel office's secretary informs CD that the Personnel Director is out, and asks CD if he would like to leave a message. CD tells her that he is back from military service and would like to return to his job after resting for another week or two. He asks her to have the Personnel Director advise him when he should come back to work. Nothing more happens, so on April 17, 1980, CD takes a job driving a taxi while awaiting word from Store S. On June 15, 1980—more than 90 days after his release from military service—CD still has not heard from the store, so he goes to see the Personnel Director, who informs CD that it is now too late for him to press a claim.
>
> CD made a timely and adequate application to Store S for reemployment, and the responsibility for making the next move was the Store's. He is entitled to reinstatement and to lost wages equal to the difference between what he would have earned if Store S had promptly reemployed him and what he did earn in the cab driving job from about April 1, 1980, when he was ready to return to work, until he was properly reinstated.

[17] 1988 *VRR Handbook,* page 7-1.

Even if CD had waited until October 1, 1980, for example, to check with Store S as to what the trouble was, the same answer would still apply.[18]

The employer's lack of an appropriate vacancy in September 2010 did not defeat your right to reemployment.

It seems clear that you met the USERRA eligibility criteria in September 2010 and that the employer had the legal obligation to reemploy you promptly[19] in the position of employment that you would have attained if you had been continuously employed or in another position (for which you were qualified) that was of like seniority, status, and pay.[20] You were entitled to prompt reemployment *even if that meant displacing another employee.*

I invite your attention to *Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993).[21] In that case, the Federal Circuit[22] overruled a Merit Systems Protection Board (MSPB) decision for the Department of Veterans Affairs (VA) and against a veteran.

Henry P. Nichols was the GS-13 "Chief, Chaplain Services" at the Brockton/West Roxbury VA Medical Center. Nichols gave advance notice and left his civilian job to serve a three-year active duty tour in the Air Force, from February 1989 to February 1992. After Nichols left, the department appointed another chaplain (Walsh) to the position on a permanent basis. In October 1991, four months before his scheduled release from active duty, Nichols wrote to the department to inform it of his intention to leave active duty in February 1992 and to seek restoration to his position at Brockton, Massachusetts.

The Federal Circuit rejected the department's arguments that it was not required to displace Walsh in order to reemploy Nichols. "The department first argues that, in this case, Nichols' former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, those hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who' left private

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[18] 1988 *VRR Handbook,* pages 7-7 and 7-8.

[19] The employer should have had you back on the payroll within two weeks after your application. 20 C.F.R. 1002.181.

[20] 38 U.S.C. 4313(a)(2)(A).

[21] The citation means that you can find this case in Volume 11 of *Federal Reporter Third Series,* starting on page 160.

[22] The Federal Circuit is the specialized federal appellate court that sits here in Washington and has nationwide jurisdiction over certain kinds of cases, including appeals from decisions of the Merit Systems Protection Board (MSPB).

life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 285 (1946). *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him."

For other cases holding that the lack of a current vacancy does not excuse the employer's failure to re-employ the returning veteran, I invite the reader's attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981). There are circumstances in which the employer must lay off the replacement in order to reemploy the returning veteran. I think that your situation is such a case.

The delay in asserting your USERRA rights is not fatal to your case.

Under section 4327(b) of USERRA, *there is no statute of limitations.* Section 4327(b) reads as follows:

> (b) Inapplicability of statutes of limitations. If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, *there shall be no limit on the period for filing the complaint or claim.*[23]

Available remedies under USERRA

Q: Let us assume that I retain private counsel, sue the employer, and prevail. What remedies are available to me under USERRA?

After the employer failed to reemploy me in late September 2010, I continued diligently seeking reemployment, but I did not find a new job until January 1, 2011.

A: Section 4323(d)(1) of USERRA sets forth the remedies that a court may award against a private employer or a state or local government:

> (d) Remedies.
> (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

[23] 38 U.S.C. 4327(b) (emphasis supplied). Section 4327 was added by section 311(f)(1) of Public Law 110-389, signed into law by President George W. Bush on October 10, 2008. 122 Stat. 4163. This preclusion of statutes of limitations clearly applies to causes of action that accrued on or after October 10, 2008, and your cause of action clearly accrued in September 2010, when you applied for reemployment. Thus, no statute of limitations applies to your case. The application of section 4327 to causes of action that accrued before October 10, 2008 is uncertain. Please see Law Review 0948.

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.[24]

Under USERRA or any employment discrimination law, you have a duty to mitigate your damages, by seeking and if possible accepting suitable alternative employment. We need to compute what you would have earned from the defendant employer during the last three months of 2010.[25] You are entitled to be compensated for what you would have earned from the defendant employer, less any earnings that you received from gainful employment during those three months.

After you found a new job on January 1, 2011, your back pay should be computed on a pay period by pay period basis. If you received, during a particular pay period, more money from the mitigating employment than you would have received from the lawbreaking employer, but for the violation, you do not receive back pay for that pay period. But the excess should not be applied to earlier or later pay periods. *See Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348 (8th Cir. 1983).

Q: I started a new job with XYZ Corporation on January 1, 2011. For each pay period in 2011, I earned more at XYZ than I would have earned from the defendant employer, but only because I worked a lot of overtime at XYZ. During the two years that I worked for the defendant employer before I joined the Coast Guard, I was never required to or given the opportunity to work even one hour of overtime. It seems unfair to compare straight-time earnings with earnings that include a lot of overtime compensation. How does this work?

A: In subtracting what you earned at XYZ from what you *would have earned* at the defendant employer, only compensation for *comparable hours* should be included. *See Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365 (5th Cir. 1971); *McKnight v. Twin Cities Broadcasting Corp.,* 13 CCH Labor Cases Par. 64,067 (D. Minn. 1947). The lawbreaking employer should not benefit from the overtime work that you did at XYZ.

Q: I found a great new job at the ABC Corporation on January 1, 2012. In 2012 and thereafter, I have made and am making substantially more money at ABC than I would have made at the defendant employer. I certainly do not want to return to the defendant now. How does this work?

A: Because you are making (after January 1, 2012) substantially more money at ABC than you would have made from the defendant, without regard to overtime, you are not entitled to back

[24] 38 U.S.C. 4323(d)(1).

[25] The amount that you would have earned in October-December 2010 will likely be substantially more than you were earning in June 2006, just before you left your job to enlist in the Coast Guard.

pay after that date, but the excess does not reduce the back pay to which you are entitled for the period between September 2010 and January 2012. In your lawsuit, you should ask for the court to order the defendant employer to reinstate you, if only for the purpose of increasing your leverage on the defendant in settlement negotiations.

Q: I think that the janitorial service company violated USERRA willfully. Does USERRA provide for punitive damages?

A: USERRA does not provide for punitive damages, but it does provide for *liquidated damages* (double damages) if the court finds that the employer violated USERRA willfully.[26] USERRA's 1994 legislative history includes the following paragraph on remedies:

> Section 4322(d) [now 4323(d)] provides for litigation of contested [USERRA] cases in federal district court on behalf of employees of private employers and State and local governments. Section 4322(d)(2) [now 4323(d)(1)] provides that courts are empowered to require employers to comply with the provisions of this chapter [USERRA], to compensate the employee for any loss of wages or benefits, *and to award liquidated [double] damages in case of willful violations. A violation shall be considered to be willful if the employer or potential employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited* by [the provisions of this chapter]. *Hazen Paper Co. v. Biggins,* 61 U.S.L.W. 4323, 4327 (U.S. Supreme Court, decided April 20, 1993.)[27]

It is unfortunate that we did not have the opportunity to send a certified letter to the employer in September 2010, reminding the company of USERRA, in order to lay the proper groundwork for a finding of willfulness.

[26] 38 U.S.C. 4323(d)(1)(C).
[27] 1994 *USCCAN* at 2471. *Hazen Paper Co.* can be found at 507 U.S. 604 (1993).