

**It Is Unlawful for an Employer To Deny Initial Employment
Based on Unavailability on the Start Date, When the Unavailability
Is Based on Active Military Service.**

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

1.2—USERRA forbids discrimination

Q: I am a Colonel in the Army Reserve and a life member of the Reserve Officers Association (ROA). I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I have worked for the Department of the Navy (DON) as a civilian employee since 2000, and that is the only federal civilian job that I have held. In the summer of 2013, I applied for and was selected for a one-year voluntary active duty tour in Washington, DC, from October 1, 2013 through September 30, 2014. I gave prior oral and written notice to my DON supervisor and left my DON GS-13 job in late September 2013 to report to active duty in DC on October 1 of that year.

In March 2014, while I was on active duty in DC, I learned of a GS-14 vacancy at another federal agency (AFA) that was right up my alley. I applied for the job through USA Jobs, the website operated by the United States Office of Personnel Management (OPM). In my on-line

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "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 is the author or co-author of more than 1,200 of the almost 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

job application, I disclosed that I was on active duty until September 30, 2014 and that I would be available to start work in early October. I was invited to come in for an interview, and I attended the interview in person, wearing my Army uniform. During the interview, I again informed AFA that I was on active duty until September 30 and that I would be available to start work in early October.

In early June 2014, I was notified by mail that I had been selected for the GS-14 AFA position and that the start date was July 1, 2014. I asked for and was granted the opportunity to meet with the head of the AFA office to discuss my start date. The meeting was in mid-June 2014, and again I attended in uniform. I explained that I very much wanted the job and that I would be available in early October, because I was on active duty until September 30. The office head urged me to ask the Army for an early release, and I agreed to do that. I asked, but the Army told me that I would not be released early because the project I was working was not completed.

On June 20, I informed the AFA office head that the Army would not grant me early release and I reiterated that I could report to work on October 1, 2014. One day later, the AFA personnel office informed me that there was “a problem with the job description” and that the vacancy announcement was void and my selection for the position had been cancelled.

In September 2014, as I was approaching the end of my year of active duty, I contacted AFA again and reiterated that I wanted the job and that I would show up for work at AFA headquarters on October 1. AFA did not respond. I showed up on October 1, but I was unable to gain access to the building. The Army offered me the opportunity to do another year of active duty, through September 30, 2015, and I took that opportunity. I notified my DON employer that I had extended my active duty for a second year.

In November 2014, AFA posted a “new” vacancy announcement in USA Jobs, and the new announcement was virtually identical to the first announcement. Only a few words in the job description were changed, and those changes were not substantive. I applied for this new vacancy, but I was not selected.

I think that the “problem with the job description” was a pretext, and that what really happened was that AFA terminated my employment, before I had even started work, just because I was on active duty and not available to start work on the start date that AFA had in mind. Do you think that my USERRA rights were violated?

A: Yes. I think that you were an employee of AFA as of early June 2014, when you received an unambiguous job offer with a start date and you accepted the offer. When AFA withdrew the job offer after it came to understand that you were not available to start work on July 1, AFA violated section 4311 of USERRA by denying you “retention in employment.” I think that AFA violated section 4311 again in November 2014, when it denied you “initial hiring” based on your Army service. Section 4311 of USERRA reads as follows:

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) 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.*

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited--
(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is *a motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.³

I also think that AFA violated section 4312 when it denied you *reemployment* on October 1, 2014. At that point, you were entitled to reemployment because you met the five USERRA conditions. You held a federal civilian position of employment, and you left that position in September 2013 for the purpose of performing uniformed service. You gave prior oral and written notice to the federal civilian employer, DON. You had not exceeded USERRA's five-year limit on the duration of the period or periods of uniformed service, relating to the employer

³ 38 U.S.C. 4311 (emphasis supplied).

relationship for which you sought reemployment.⁴ You served honorably and were released from the period of service on September 30, 2014, without having received a disqualifying bad discharge from the Army. On October 1, you made a timely application for reemployment, well within the 90-day deadline permitted to you under section 4312(e)(1)(D) of USERRA.⁵

In a 2010 case, Judge Terrence F. McVerry of the United States District Court for the Western District of Pennsylvania wrote:

[I]f a servicemember brings a section 4311 claim, and a defendant responds that it cannot be held liable under the Act [USERRA] when it did not hire the servicemember because s/he was unavailable for the defendant's start date, the defendant is not absolved from liability. A refusal to hire an active duty serviceperson because s/he will still be on active duty when the position is to start is an impermissible reason under the legislation, i.e, it is not a defense.⁶

Q: My current Army orders expire on September 30, 2015. This time, it is unlikely that the orders will be extended because the project I have been working on is nearing completion and because I am nearing my Mandatory Retirement Date in the Army Reserve. How do you suggest that I proceed?

A: On October 1, right after you leave active duty, you should apply for reemployment at the new federal agency, in writing and by certified mail. I can help you with the wording of the letter. The new federal agency will almost certainly deny or ignore your application, but at least you will have laid a proper foundation for a USERRA claim.⁷ I invite your attention to Law Review 15064 (July 2015) for a detailed discussion of USERRA's enforcement mechanism with respect to federal agencies as employers.

⁴ Please see Law Review 201 for a detailed summary of what counts and what does not count in exhausting your five-year limit.

⁵ 38 U.S.C. 4312(e)(1)(D).

⁶ *Hamovitz v. Santa Barbara Applied Research, Inc.*, 2010 U.S. Dist. LEXIS 31256 (W.D. Pa. 2010). See also *McLain v. City of Summerville*, 424 F. Supp. 2d 329 (D. Mass. 2006); *Beattie v. Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991).

⁷ After AFA denies your application for reemployment, or after two weeks have passed without an AFA response, you should apply for reemployment at DON and return to work in the GS-13 position. This does not moot your USERRA claim against AFA.