LAW REVIEW 15075[1]
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USERRA Applies to Voluntary as well as Involuntary Military Service

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1.1.1.6—USERRA applies to foreign employers in the U.S.
1.1.3.1—USERRA applies to voluntary service
1.2—USERRA forbids discrimination
1.3.1.2—Character and duration of service
1.8—Relationship between USERRA and other laws/policies

A recent situation that has been brought to my attention causes me to reiterate what I wrote way back in October 2001, in Law Review 30. The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies equally to voluntary as well as involuntary periods of uniformed service, and there is no "rule of reason" limiting the burden that can be or ought to be placed on a particular civilian employer, involving military service performed by one or more employees who are members of Reserve Components (RC) of the United States armed forces.[3]

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[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.

[3] There are seven Reserve Components: the Army Reserve, the Army National Guard, the Air Force Reserve, the Air National Guard, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. According to the Department of Defense (DOD), more than 900,000 RC members have been called to the colors since the terrorist attacks of September 11, 2001, and more than 350,000 of them have been called up more than once.

The recent situation that has been brought to my attention involves an Air Force Reservist who is employed within the United States by a foreign-owned company.[4] The reservist is currently away from his civilian job for voluntary active duty in the Air Force. The foreign employer contacted the reservist's commanding officer (CO) to complain about the burden placed on the employer by this individual's absence from work for military service. The CO properly explained to the employer the provisions of USERRA and that the individual will have the right to reemployment if he meets the five USERRA conditions for reemployment.[5]

Not satisfied with the answer it received from the individual's CO, the foreign employer contacted an active duty U.S. military officer assigned to attache duty in the U.S. embassy in the employer's home country. This military officer agreed to make inquiries on behalf of the employer. He confirmed for the employer that the individual had volunteered for the active duty in question and he told the employer that the reservist was guilty of "USERRA abuse" and he gave the employer "permission" to fire the reservist, which the employer did.

The reemployment statute dates from 1940 and was substantially rewritten in 1994.

As is explained in Law Review 15067 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In 1940, as part of the Selective Training and Service Act (STSA),[6] Congress provided reemployment rights to young men who left federal and private sector jobs[7] when drafted. In 1941, as part of the Service Extension Act, Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees. Almost from the very beginning, the reemployment statute has applied to voluntary as well as involuntary military service.

USERRA applies to voluntary service.

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). Today, all military service is essentially voluntary. The individual RC

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[4] USERRA and other U.S. labor laws most definitely apply to foreign-owned corporations when they operate within the United States.

[5] The individual must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary uniformed service and must have given the employer prior oral or written notice. The individual must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to that specific employer relationship. As is explained in detail in Law Review 201, there are nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit. The individual must have served honorably and must have been released from the period of service without having received a disqualifying bad discharge from the military. Finally, the person must have made a timely application for reemployment, after release from the period of service. After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. The individual in question already meets the first two conditions and will almost certainly meet the other three when he is released from active duty in 2016.

[6] The STSA is the law that led to the drafting of more than ten million young men, including my late father, for World War II.

[7] In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress expanded the VRRA to make it apply to state and local governments, as well as federal and private sector employers.

member may be involuntarily called for a specific emergency, like Iraq or Afghanistan, but it is only because the individual volunteered that he or she is subject to involuntary call-up. In the 14 years since September 11, less than 1% of the U.S. population has volunteered to serve and protect the other 99%. The point of USERRA is to ensure that members of the patriotic 1% do not fall behind the other 99% in the escalator of civilian jobs and careers. This is certainly not too much to ask of civilian employers and co-workers who have not volunteered.[8]

USERRA's definition of "service in the uniformed services" expressly includes "the performance of service on a voluntary or involuntary basis."[9] A person who has volunteered to serve has exactly the same reemployment rights as a person who was called to active duty involuntarily.

There is no rule of reason.

Before the establishment of the AVM in 1973, RC service was generally limited to "one weekend per month and two weeks in the summer." After Congress abolished the draft, DOD came to rely more on the Reserve Components, under the "Total Force Policy." Some RC members were expected or at least encouraged to volunteer for RC training and service far more extensive than the traditional model of minimal service. These expectations led to conflicts with civilian employers, who were often unwilling to accommodate military-related absences from work that exceeded the traditional model.

Under the VRRA, there was a four-year limit on "active duty" with respect to any one employer, but there was no express limit on the duration of active duty for training (ADT) and inactive duty training (IDT), either of a particular period or cumulatively with that employer. For almost 20 years, there was an intense dispute and conflicting court decisions about whether there was an implied limit or a "rule of reason." The Supreme Court finally put an end to that argument in 1991, when it held that there is no limit on the duration of ADT.[10]

USERRA eliminated the VRRA's sometimes-confusing distinctions among categories of military training or service found in the VRRA. All categories (active duty, ADT, IDT, initial active duty training, funeral honors duty, etc.) now fit within USERRA's broad definition of "service in the uniformed services." Under USERRA, the cumulative limit on service, with respect to a particular employer, is generally five years, but most Reserve component training and several other categories of service are exempt from the five-year limit.[11]

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[8] As I explained in Law Review 1255 (May 2012), I am tired of hearing unpatriotic employer carping about the "burden" placed on civilian employers by the military service of that tiny sliver of our population who have joined the Reserve Components. Tell the employers: We are not drafting you, and we are not drafting your children and grandchildren. But someone must defend this country. When you find RC service members in your workforce or among job applicants, you should cheerfully do all that USERRA requires and more.

[9] 38 U.S.C. 4303(13). The VRRA also applied to voluntary as well as involuntary service. *See Foster v. Dravo Corp.,* 420 U.S. 92, 96 n. 6 (1975); *Boston & Maine Railroad v. Hayes,* 160 F.2d 326 (1st Cir. 1947); *Mazak v. Florida Department of Administration,* 113 LRRM 3217 (N.D. Fla. 1983).

[10] *See King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).

[11] Please see Law Review 201 for a detailed discussion of what counts and what does not count in exhausting an individual's five-year limit.

When it enacted USERRA in 1994, Congress made clear that under the new law there would be no room for any "rule of reason" in interpreting the new law. Section 4312(h) of USERRA provides:

> In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, *shall not be a basis for denying protection of this chapter* if the service does not exceed the limitations set forth in subsection
> (c) [the five-year limit] and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.[12]

This section could hardly be clearer, but the intent of Congress is further buttressed by USERRA's legislative history:

> Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital*. This new section makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine re-employment rights and that *this section prohibits consideration of timing, frequency or duration of service so long as it does not exceed the cumulative limitations under section 4312(c)* and the service member has complied with the requirements under sections 4312(a) and (e).
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> The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of appropriate military authorities [*see Hilliard v. New Jersey Army National Guard*, 527 F. Supp. 405, 411-412 (D.N.J. 1981)],[13] and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.[14]

The Department of Labor (DOL) USERRA Regulations reiterate the position that no "rule of reason" limits the individual's right to be absent from his or her civilian job for military training or service:

> **§ 1002.104 Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?**

[12] 38 U.S.C. 4312(h) (emphasis supplied).
[13] Please see Law Review 15025 (March 2015) for a detailed discussion of the *Hilliard* case.
[14] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2463 (emphasis supplied).

> No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. *The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable*. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.[15]

In summary, there simply is no "rule of reason" policy that permits the civilian employer to terminate an individual or to deny the person reemployment based on the "undue burden" that the individual's military service has placed on the civilian employer.[16] The attache was speaking out of school when he told the foreign employer that the individual reservist had "abused" USERRA, and of course the attache had no authority to authorize the employer to violate USERRA.

Serving on active duty beyond the five-year limit does not justify firing the individual.

Moreover, there was no occasion to "fire" the individual reservist in 2015, while he was on active duty. At the time, the individual was not an employee of the foreign company—he was a former employee with a potential claim for reemployment, if he meets the five USERRA conditions[17] after he leaves active duty, probably in 2016. The five-year limit is an eligibility criterion for reemployment. Serving our country in uniform, even beyond the five-year limit, cannot be construed to be "misconduct" in any civilian job.

If the individual reservist is beyond the cumulative five-year limit with the employer after leaving active duty next year, the employer will then have the right to deny the individual's application for reemployment. But denying the individual's application for reemployment is

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[15] 20 C.F.R. 1002.104 (bold question in original, emphasis by italics supplied).

[16] This is not to say that the leadership of a Reserve Component should not be cognizant of and concerned about the burden that frequent and lengthy voluntary active duty tours put on the civilian employer. The way to address this concern is by declining requests for military orders, in appropriate cases, not by punishing those who volunteered and whose requests were honored by the Reserve Component. The "send me in coach" eagerness of many RC members should be encouraged, not discouraged. But just because the individual has volunteered, that does not mean that the request should always be honored. Sometimes, the right answer is: "Thank you for volunteering, but this time we are going to find somebody else. I see that you have already performed several voluntary active duty tours." In the 14 years since the terrorist attacks of September 11, the policy of the Army Reserve and Army National Guard has been to rely primarily upon involuntary call-ups, while the policy of the Air Force Reserve and Air National Guard has been to rely primarily on volunteers. As a long-term policy, I think that the Army policy is better than the Air Force policy.

[17] Please see footnote 5 for a discussion of the five USERRA conditions.

different from firing the person. Firing implies misconduct. A person who has been fired will not likely be considered for rehiring by that employer and the firing may well interfere with the individual finding employment elsewhere. It is unlawful to *fire* a person for absence from civilian work necessitated by uniformed service even if the person is beyond the five-year limit.[18]

Let's resolve this matter.

I call upon the attache to apologize to the individual reservist and to the employer for having improperly inserted himself into an issue as to which he had no legitimate role and for having misstated the provisions of USERRA. I call upon the attache to send the employer and the reservist a copy of this "Law Review" article.[19]

[18] *See Erickson v. United States Postal Service,* 571 F.3rd 1364, 1368 (Fed. Cir. 2009). Lieutenant Colonel Mathew Tully and I discuss *Erickson* in detail in Law Review 14090.

[19] There also needs to be an investigation to determine if the attache violated the Privacy Act by unlawfully obtaining private information about the reservist and sharing that information with the reservist's civilian employer.