

State Budget Crisis Does Not Excuse USERRA Violation

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

1.1.1.7—USERRA applies to state and local governments

1.3.1.2—Character and duration of service

1.3.2.4—Status of the returning veteran

Q: I am a Lieutenant 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).

On the civilian side, I have worked for our state government since 1998. My civilian career has been interrupted several times for military service periods, not including drill weekends and traditional two-week annual training tours, but I have not exceeded the cumulative five-year limit under section 4312(c) of USERRA.

My most recent active duty period was for one year, from July 1, 2012 to June 30, 2013. When I left my state job in June 2012, for this active duty period, I was one of five “directors” in a critical state program. The state refused to reinstate me into the position that I left in June 2012—the position that I most certainly would have continued to hold but for my active

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.

duty period. Instead of reemploying me in the position that I had left, the state reemployed me in another position that was created for me and for this situation, a position with ill-defined responsibilities. I protested that I wanted and believed I was entitled to the “director” position that I had left and that the ill-defined position in which I had been placed was insufficient under USERRA. I even contacted the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR), but the agency head refused to meet with the ESGR volunteer.

This year, our state government is in a fiscal crisis. The Governor is of one major party, and both houses of the state legislature are controlled by the other party. The Governor vetoed the state budget that the legislature had passed. The legislative leaders of the other party tried to override the Governor’s veto but fell several votes short of the required 2/3 majority. The legislature has been unwilling to pass a budget that the Governor will sign. Our state has been operating without a budget for some time now, and there is no end in sight to this crisis.

Recently, I was laid off from my state job because my job was deemed “non-critical.” The five directors in the office where I formerly worked are deemed to be in “critical” positions and they have not been laid off.

If the state had reemployed me properly in the summer of 2013 when I most recently returned from active duty, I would not have been laid off in the state budget crisis two years later. Do you agree that my USERRA rights have been violated?

A: Yes, assuming that the facts are as you have stated. Your facts are reminiscent of *Duarte v. Agilent Technologies, Inc.*³ In a scholarly decision, Judge Lewis T. Babcock⁴ wrote:

Section 4312 of USERRA provides that members of the armed forces or reserves who properly notify employers of their need to take a military service-related absence; who take a cumulative absence of no more than five years; and who properly reapply or report to work are entitled to reemployment. At the commencement of the trial, the parties stipulated that Duarte had established this *prima facie* case under Section 4312 and was therefore entitled to reemployment at Agilent upon his return from active duty in July of 2003.

Section 4313(a)(2)(A) of USERRA provides that a person entitled to reemployment under Section 4312 of USERRA shall be reemployed in the position of employment in which such person would have been employed if the continuous employment of such person had not been interrupted by military service or a position of like seniority, status, and pay, the duties of which the person is qualified to perform. The term “status” as used in

³ 366 F. Supp. 2d 1039. The citation means that you can find the *Duarte* case in Volume 366 of *Federal Supplement Second Series*, and the court decision starts on page 1039. I discuss *Duarte* in detail in Law Review 172 (June 2005).

⁴ Judge Babcock was appointed to the United States District Court for the District of Colorado by President Ronald Reagan and confirmed by the Senate in 1988. He has his JD (law degree) from the University of Denver in 1968 and an LLM (advanced law degree) from the University of Virginia in 1988. He assumed senior status in 2008.

Section 4313 is not defined under USERRA and, therefore, must be accorded its ordinary and common meaning. *United States v. Markey*, 393 F.3d 1132, 1136 (10th Cir. 2004). Additionally, both USERRA and its predecessor statutes are to be liberally construed for the benefit of those who left private life to serve their country. *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1997); *Garrett v. Circuit City Stores, Inc.*, 338 F. Supp. 2d 717, 722 (N.D. Tex. 2004). See also H.R. Rep. No. 103-65 at 23 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2456 (“The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced.”) ...

Here, although Duarte’s title, pay, and benefits upon his return from active duty in July of 2003 were the same as when he had been called up in November of 2002, the duties of the design consultant [position] were significantly different. Specifically, Duarte was no longer the primary design consultant for the EPSG group, but rather was providing minimal assistance to other primary design consultants and working on a special project. Although Groninga [an Agilent supervisor] testified that she considered the benchmarking project to which Duarte was assigned to be important and a great opportunity for him, assignment to this project, as well as serving in an assistant role to other design consultants, resulted in Duarte’s diminished status at Agilent.

I would recognize that Agilent would have experienced some difficulty returning Duarte to his former position as primary design consultant for the EPSG group or for any of the business groups given the timing of his return in relation to that of the annual pay plan design process. But this does not excuse Agilent’s failure to return Duarte to this position at the first available opportunity. ... And, Agilent could have actively involved him in the annual pay design process for one of the business groups with appropriate assistance and supervision.

Under these circumstances, I conclude that Agilent violated 4313(a)(2)(A) of USERRA based on Duarte’s diminished status upon his return to employment at Agilent. USERRA’s stated purpose is to encourage service in the armed forces by eliminating or minimizing the disadvantages members of the armed forces experience in their civilian careers and employment as a result of their military service. 38 U.S.C. 4301(a)(1). Duarte was disadvantaged as a result of his military deployment and the corresponding diminished responsibilities assigned to him upon his reemployment. Moreover, as discussed below, these diminished responsibilities that directly resulted from his military deployment played a significant role in Duarte’s termination, thereby placing him at even further disadvantage as a result of his military service.⁵

Lieutenant Colonel Duarte was unlawfully reemployed in an ill-defined position of diminished status and responsibilities. As a result, he was vulnerable to termination some months later when the company’s financial status took a turn for the worse and reductions in force were necessitated. Similarly, you were unlawfully reemployed in an ill-defined position of diminished

⁵ *Duarte*, 366 F. Supp. 2d at 1045-46.

status and responsibilities when you returned from military service in the summer of 2013. As a result, you were vulnerable to layoff when a state budget crisis occurred two years later. I think that *Duarte* is directly on point and very supportive of your case.

Conclusion

You were entitled to reemployment by the state in the summer of 2013 because you met the five USERRA conditions. You were unlawfully reinstated into an ill-defined position of diminished status and responsibilities. The insufficiency of your 2013 reinstatement made you vulnerable to layoff in the state budget crisis of 2015. Your USERRA rights have been violated.