

**You Have the Right to Reemployment and the Employer Must Accommodate
your Temporary Disability**

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

Update on Sam Wright

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Q: I am a Staff Sergeant in the Army Reserve and a member of the Reserve Officers Association (ROA). Recently, I was on active duty for almost a year, from January until December 2015. I did not deploy to the combat zone, and I was not called to active duty involuntarily.

In November, while I was on active duty, I suffered a serious knee injury during a pick-up basketball game. I have already had one surgery and I am scheduled for a second surgery. I was released from active duty in December, at the end of the period for which I was ordered to active duty. The Army gave me a Notice of Eligibility (NOE) entitling me to Army medical care for the follow-up surgery and months of rehabilitation treatments. It will likely be a year (until January 2017) before I am fully recovered.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 BA 1973, Northwestern University; JD (law degree) 1976, University of Houston; LLM (advanced law degree) 1980, Georgetown University. Captain Wright is retired from the Judge Advocate General's Corps of the United States Navy Reserve. From June 2009 through May 2015, he served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. He is the author of more than 1200 of the published "Law Review" articles. Captain Wright has dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the predecessor reemployment statute for more than 33 years, as a judge advocate in the Navy and Navy Reserve, as an attorney for the United States Department of Labor (DOL), as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the SMLC Director. While at DOL, he and one other DOL attorney (Susan M. Webman) largely drafted USERRA. He has returned to the law firm Tully Rinckey PLLC. To arrange for a consultation with Captain Wright or another Tully Rinckey attorney, please call Ms. JoAnne Perniciaro of Tully Rinckey's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

I left my job at our local electric utility company when I reported to active duty in January 2015, and I promptly applied for reemployment after I left active duty in December 2015. The company insisted that I submit to a physical examination conducted by a physician appointed by the company. The physician refused to clear me for return to work. The civilian job occasionally requires vigorous physical activity, restoring power and repairing power lines after a storm. I recognize that I cannot do my pre-service job for most of 2016, while my knee recuperates, but there are other jobs at the company that I can perform. But the company has refused to reemploy me until I receive medical clearance from the company physician.

I found your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) by doing an Internet search. Do you think that my USERRA rights have been violated?

A: Yes. USERRA³ applies to voluntary as well as involuntary military service, and to service within the United States as well as overseas. USERRA’s special provision for disabled veterans is not limited to those who were wounded in action. I think that your USERRA rights have been violated, but first we must establish that you meet the five USERRA conditions for reemployment.

As I have explained in Law Review 15116 and other articles, you must meet five simple conditions to have the right to reemployment:

- 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. It seems clear beyond any question that you meet this condition.
- b. You must have given the employer prior oral or written notice. I shall assume for purposes of this article that you gave such notice.
- c. You 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. As I have explained in Law Review 201 and other articles, there are nine exemptions to the five-year limit—that is, kinds of service that do not count toward exhausting your limit. Since your recent active duty period was voluntary, it counts toward your five-year limit unless your orders contain “magic words” exempting the period from the computation of your limit. For purposes of this article, I shall assume that this recent period of active duty (almost a year) did not put you over the cumulative five-year limit with respect to your employer relationship with the utility company.

³ USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-4335).

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁴ The fact that you are still in the Army Reserve clearly demonstrates that you did not receive a disqualifying bad discharge.
- e. You must have made a timely application for reemployment after release from the period of service. Because your period of service lasted more than 180 days, you had 90 days (starting on the date of release) to apply for reemployment.⁵ It seems clear that your application for reemployment was timely.

Because you met the USERRA eligibility conditions, the employer was required to reemploy you promptly—within two weeks after you applied for reemployment.⁶ You were entitled to be reemployed in the position of employment that you *would have attained if you had been continuously employed* or alternatively in another position for which you are qualified that is of like seniority, status, and pay. For purposes of this article, I shall assume that the position that you left in January 2015 is the position that you would have continued to hold in December 2015 if you had remained continuously employed instead of going on active duty.

USERRA sets forth the five conditions that you must meet to have the right to reemployment, and you meet those conditions. The employer has no right to add a sixth condition—that you pass the physical examination conducted by the company physician.⁷

Section 4313(a)(3)⁸ sets forth the rights of the person who meets the five USERRA conditions and who returns to work with a temporary or permanent disability incurred or aggravated during the period of service. The employer is required to make reasonable efforts to accommodate your disability in the position that you left in January 2015 and almost certainly would have continued to hold in December 2015, but for your having left the job for service. If the disability cannot be reasonably accommodated in that position, the employer is required to reemploy you in some other position for which you are qualified *or for which you can become*

⁴ A disqualifying bad discharge would be a bad conduct discharge (BCD) or dishonorable discharge, part of the sentence for a court martial conviction for a serious offense. An “other than honorable” administrative discharge would also disqualify you from reemployment, as would a dismissal or being “dropped from the rolls” of your uniformed service. See 38 U.S.C. 4304.

⁵ 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁶ 20 C.F.R. 1002.181. This citation refers to title 20 of the Code of Federal Regulations, section 1002.181. This is part of the DOL USERRA Regulations. Section 4331 of USERRA, 38 U.S.C. 4331, gives DOL 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* in September 2004. After considering the comments filed and making a few adjustments, DOL published the final regulations in December 2005.

⁷ As I have explained in Law Review 0730 (June 2007) and other articles, the doctrine of *expressio unius est exclusio alterius* applies to the interpretation of USERRA. That is Latin for “to express one is to exclude all the others.” USERRA sets forth five conditions that you must meet to have the right to reemployment under USERRA. The expression of these five conditions precludes a court from finding other “implied” conditions and precludes the employer from imposing other conditions.

⁸ 38 U.S.C. 4313(a)(3).

qualified with reasonable employer efforts. These rights certainly include but are not limited to those who suffered wounds in combat. Section 4313(a)(3) applies to “a person who has a disability incurred in, or aggravated during, such service.” Your knee injury in a basketball game certainly qualifies you for the rights provided by section 4313(a)(3).

Based on the facts as you have stated them, you have a strong USERRA case. You should retain competent counsel and sue, if the employer does not respond favorably to your lawyer’s demand letter. Good luck, and thank you for your service to our country in the Army Reserve.