

LAW REVIEW 16009

February 2016

USERRA Rights of Wounded National Guard Technician

By Captain Samuel F. Wright, JAGC, USN (Ret.)¹

Update on Sam Wright

1.1.3.3—USERRA applies to National Guard service

1.3.2.9—Accommodations for disabled veterans

1.4—USERRA enforcement

1.6—USERRA statute of limitations

1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Judge Advocate General's Corps of the Army National Guard, and I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 16007, about the application of USERRA to the wounded warrior scenario.

I recently became the State Judge Advocate for the Army National Guard and Air National Guard of our state, and we also have a new TAG here.² Just yesterday, I heard from a seriously disabled veteran—let's call him SGT Joe Smith. Smith sent me a copy of your Law

¹ 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 Navy Reserve. He has been dealing with the federal reemployment statute for more than 33 years. 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 Public Law 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA), as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. The 1994 version of USERRA was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335). 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. From 2009 through 2015, Wright was the Director of the Service Members Law Center (SMLC), as a full-time employee of the Reserve Officers Association (ROA). Wright is the author of more than 90% of the almost 1500 "Law Review" articles available at www.servicemembers-lawcenter.org. At that website, you will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. After ROA disestablished the SMLC in 2015, Wright returned to Tully Rinckey PLLC. To arrange a consultation with Captain Wright or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Pernicaro, the firm's Director of Client Relations, at (518) 640-3538. Please mention Captain Wright when you call.

² The Adjutant General (TAG) is the head of the National Guard of a specific state. In our state, like most states, the TAG is appointed by the Governor.

Review 16007 and complained about the way that he was treated when he returned from active duty in 2012.

In 2002, Smith was hired by the TAG of our state as a National Guard Technician (NGT). NGTs have a hybrid civilian-military status and also a hybrid state-federal status.³ During the week, the NGTs are civilian employees of the Army National Guard in our state, although the NGTs wear Army uniforms and observe military courtesies (saluting, etc.) while at work. During drill weekends, Smith participated in a military capacity, like the traditional National Guard members. As an NGT, Smith was required to maintain and did maintain membership in one of our National Guard units.

In 2007, during the “surge” in Iraq, one of our National Guard units was mobilized and deployed to Iraq, and Smith deployed with his unit. Smith was wounded in action and evacuated to an Army hospital here in the United States. Smith lost his left leg and suffered other serious, permanent disabilities. He was retained on active duty until January 2012, and while on active duty he had several surgeries and a great deal of physical rehabilitation, including the installation of a prosthetic leg. Finally, the Army medically retired Smith with a substantial disability rating.

After Smith left active duty in January 2012, he returned to our state and applied to the TAG for reemployment, but the TAG told him that he could not be reemployed because of his disability retirement—an NGT must be an active member of one of the National Guard units that he or she supports. Smith complained to me that he has been diligently seeking employment for more than four years but has not found a job. After having read your Law Review 16007, I think that we (the National Guard of our state) had a duty to reemploy Smith and to make accommodations for his disability. How should Smith’s situation have been handled?

A: I invite your attention to section 4314(d) of USERRA:

If the Adjutant General of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b) [of section 4314].⁴

Clearly, it was impossible or unreasonable to reemploy Smith in 2012 as an NGT, because of his disabilities and his retired status. The TAG of your state should have made that determination

³ NGTs are paid with federal funds, in accordance with title 32 of the United States Code, but they report to the National Guard of the state.

⁴ 38 U.S.C. 4314(d).

in writing and should have communicated that determination to the United States Office of Personnel Management (OPM). Then, OPM likely would have acted promptly to ensure that Smith was placed in an appropriate position in the Executive Branch of the Federal Government. If OPM failed or refused to do its duty under section 4314(d), Smith could have brought an enforcement action against OPM in the Merit Systems Protection Board (MSPB), under section 4324 of USERRA.⁵

Q: Is it too late for us to take that action now?

A: No. There is no statute of limitations under USERRA.⁶

I urge the Chief of the National Guard Bureau (NGB) to educate the 54 state and territorial TAGs about their obligations under USERRA with respect to NGTs who leave their technician positions for voluntary or involuntary active duty.⁷ As the civilian employer of NGTs,⁸ the TAG must be the very model of model employers, with respect to compliance with USERRA. If the TAG fails to comply with USERRA with respect to NGTs, how can the TAG persuade the store owner in your state to accommodate the inconvenience caused by military training and service performed by National Guard members?

I invite your attention to the words of Jesus Christ, as recorded in the *Gospel of Matthew*:

Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged, and with what measure ye mete, it shall be measured to you again. And why beholdest thou the mote that is in thy brother's eye but considereth not the beam that is in thine own eye? Or how wilt thou say to thy brother: Let me pull out the mote out of thine eye, and, behold, a beam is in thine own eye. Thou hypocrite, first cast the beam out of thine own eye, and then shalt thou see clearly to cast out the mote out of thy brother's eye.⁹

⁵ 38 U.S.C. 4324.

⁶ See 38 U.S.C. 4327(b).

⁷ I addressed section 4314(d) and the wounded technician scenario in my Law Review 155 (December 2004).

⁸ "In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed." 38 U.S.C. 4303(4)(B).

⁹ *Gospel of Matthew*, Chapter 7, verses 1-5 (*King James Bible*).