

USERRA Applies to Local Government

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Update on Sam Wright

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Q: I am the city manager of a very small city in Texas. I took over in late 2013 after the long-time city manager retired. A few months later, our long-time police chief retired, and I brought in Mary Jones as the new chief. She had been serving as a Sergeant in the police force of a nearby big city. When I hired Mary, I did not know that she was also a soldier in the Army Reserve. If I had known that, I never would have hired her in the first place.³

¹ I 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) and other 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. I am the author of more than 1200 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For six years (2009-15), I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015) concerning the accomplishments of the SMLC. I have been dealing with the federal reemployment statute for almost 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed rewrite of the 1940 reemployment statute that President George H.W. Bush presented to Congress as his proposal in February 1991. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353 (USERRA), and that version was 85% the same as the Webman-Wright draft. I have also dealt with the reemployment statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

³ You should be aware that discrimination in *initial employment* on the basis of membership in a uniformed service or obligation to perform service is unlawful. See 38 U.S.C. 4311(a).

Just five months after she took over as chief, Jones told me that she was being called to active duty, and she gave me only one month of advance notice. I immediately suspended her with pay and directed the city attorney to conduct an investigation. I strongly believe that she volunteered for this active duty opportunity and that she misled me about her military status when I interviewed her for the police chief position.

On her last day in town, before she traveled overseas for the Army, I fired Jones as the police chief. That was two years ago. Just a few days ago, she showed up at my office and gave me some military paperwork that she referred to as a “DD-214” and told me that under something called “YOU SARAH” I am required to reinstate her as the police chief. When I expressed bewilderment as to what she was talking about, she told me to contact you. What is all this about?

A: Jones is referring to a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA). This law is codified in title 38 of the United States Code at sections 4301 through 4335.⁴ As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA⁵ and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), which was originally enacted in 1940.⁶ For more than ¾ of a century, federal law has protected the civilian jobs of those who are called to the colors.

As I have explained in Law Review 15116 (December 2015) and other articles, a person must meet five simple criteria to have the right to reemployment under USERRA:

- a. 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.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the civilian employer relationship for which the person seeks reemployment.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, must have made a timely application for reemployment.

⁴ 38 U.S.C. 4301-35.

⁵ Public Law 103-353.

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.

It seems clear beyond any cavil that Jones meets these five conditions. She left her job for service and gave you (the city) prior oral or written notice. She did not need your permission, and you (the employer) did not get a veto on her departure from her job for military service.

Section 4331 of USERRA⁷ gives the Department of Labor (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*, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. These regulations are published in title 20 of the Code of Federal Regulations, Part 1002. The pertinent section is as follows:

Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give notice of pending service.⁸

As to the five-year limit, it is cumulative, but only with respect to the employer relationship for which the person seeks reemployment. Military service that Jones performed before she began her job with your city is irrelevant for purposes of the five-year limit. Part or all of Jones' recently completed period of service may be exempt from the five-year limit,⁹ but even if the entire two-year period counts she is still well within the limit.

You have stated that Jones left with you a copy of her DD-214. That form will show that she served honorably and that she did not receive a disqualifying bad discharge, like a bad conduct discharge or dishonorable discharge.

As to the timeliness of her application for reemployment, Jones had 90 days (starting on the date of her release) to apply for reemployment, after a period of service that lasted for 181 days or more.¹⁰ Her DD-214 shows the date she entered this recent period of service and the date that she was released. If her visit to your office was within 90 days after her release, her application was timely.

Jones was not required to use any particular form of words when applying for reemployment and her application was not required to be in writing. The pertinent section is as follows:

Is an application for reemployment required to be in any particular form?

⁷ 38 U.S.C. 4331.

⁸ 20 C.F.R. 1002.87 (bold question in original).

⁹ Please see Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count toward exhausting the five-year limit.

¹⁰ 38 U.S.C. 4312(e)(1)(D).

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.¹¹

It seems clear beyond cavil that Jones meets the five USERRA conditions. Accordingly, you (the city) are required to reemploy her promptly¹² “in the position of employment in which the person [Jones] would have been employed if the continuous employment of such person had not been interrupted by such service, or a position of like seniority, *status*¹³ and pay, the duties of which the person is qualified to perform.¹⁴ It seems clear beyond cavil that if Jones had not been called to the colors two years ago she would still be the police chief. Other than police chief, there is no other position for which Jones is qualified that is of like status to the position she left and would have retained, but for her service. Thus, you (the city) are required to reinstate Jones as the Chief of Police.

Q: But Jones volunteered for this period of service.

A: That does not matter. USERRA applies equally to voluntary and involuntary service. Section 4303 of USERRA defines 16 terms used in this law, including the term “service in the uniformed services.” That term is defined as follows: “The term ‘service in the uniformed services’ means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority.”¹⁵

For almost two generations, all military service in our country has been essentially voluntary. In 1973, Congress abolished the draft and established the All-Volunteer Military. Without a law like USERRA, it would not be possible for the services to recruit and retain a sufficient quality and quantity of personnel to defend our country.

Q: But I fired Jones the day before she left.

A: That does not matter. The proximity in time between when she notified you of her call to the colors and then when you suspended her then fired her shows clearly that the firing was

¹¹ 20 C.F.R. 1002.118 (bold question in original).

¹² Under the DOL USERRA Regulations, Jones is entitled to be back at work and back on the payroll within two weeks after her application for reemployment. 20 C.F.R. 1002.181.

¹³ Please see Law Review 16023 (April 2016), titled “What Is Status?”

¹⁴ 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

¹⁵ 38 U.S.C. 4303(13) (emphasis supplied).t

motivated by her service in the Army Reserve and her call to active duty. Thus, the firing violated section 4311(a) of USERRA.¹⁶ Moreover, you really did not fire her because she left work that same day to report to active duty as ordered. What you did was to express the intent to deny her reemployment when and if she came back from service and sought reemployment. That expression of intent shows that you violated USERRA willfully, so that the court will award her double damages.¹⁷

Q: When Jones went off to the Army two years ago, I had no idea when or if she might return, so I filled the police chief position with Bob Smith, and he is doing a fine job. Is the city required to displace Smith in order to reemploy Jones?

A: Yes. I invite your attention to the following paragraph in a decision of the United States Court of Appeals for the Federal Circuit:

The department [Department of Veterans Affairs, employer in the case] first argues that, in this case, Nichols' former position was "unavailable" because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. "Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for non-veteran employees, those hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who left private life to serve their country. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)." *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.¹⁸

Q: When Jones left for the Army two years ago, she said nothing about returning, and she did not mention that a federal law gave her the right to return.

A: It was not Jones' responsibility to educate you (the city) about federal law, and she was not required to decide, at the time she left for military service, that she would seek reemployment

¹⁶ 38 U.S.C. 4311(a).

¹⁷ 38 U.S.C. 4323(d)(1)(C).

¹⁸ *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). Other cases holding that the lack of a current vacancy and the need to displace a fellow employee do not excuse the employer from the obligation to reemploy include *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981).

upon release from the period of service. I invite your attention to the pertinent section of the DOL USERRA Regulations:

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.¹⁹

Q: What is the bottom line?

A: The bottom line is that the city has a clear legal obligation to reinstate Jones promptly in the police chief position, even if that necessitates firing the new police chief hired after she left. If the city refuses to comply with this legal obligation, Jones will sue, and she will prevail. The court will order the city to reinstate Jones as police chief.²⁰ The court will order the city to compensate Jones for the pay and benefits that she lost because of the city's violation of USERRA.²¹ If the court finds that the city violated USERRA willfully, as is likely, the court will double the back pay award.²² If Jones retains private counsel and prevails, the court can award her reasonable attorney fees, expert witness fees, and litigation expenses.²³

It should also be noted that you, as the city manager, can be sued personally and can be held personally liable for violating Jones' USERRA rights. USERRA's definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated employment-related responsibilities."²⁴

¹⁹ 20 C.F.R. 1002.88 (old question in in original).

²⁰ 38 U.S.C. 4323(d)(1)(A).

²¹ 38 U.S.C. 4323(d)(1)(B).

²² 38 U.S.C. 4323(d)(1)(C).

²³ 38 U.S.C. 4323(h)(2).

²⁴ 38 U.S.C. 4303(4)(A)(i) (emphasis supplied).