

It Is Illegal for the Air Force To Discriminate against an Air Force Reservist in Hiring for a Civilian Position

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

Update on Sam Wright

- 1.1.1.8—USERRA applies to the Federal Government
- 1.1.3.2—USERRA applies to regular military service
- 1.2—USERRA forbids discrimination
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a Colonel in the Air Force. I am a Wing Commander at a major Air Force base. My question relates to Major Joe Smith (not his real name). A few months ago, he left active duty after more than 13 years. I know him because he served here for the last three years of his active duty. After he left active duty, I encouraged him to apply for a civilian vacancy in the wing.

When I encouraged Smith to apply for an Air Force civilian job, I did not realize that he had affiliated with the Air Force Reserve (USAFR) after he left active duty. When he applied for a civilian job in the wing, I became aware of his affiliation. I told him that I would consider him for the civilian job only if he agreed to disaffiliate from the USAFR. Employing a reservist is a

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 was 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 USERRA (enacted in 1994) and the predecessor reemployment statute (enacted in 1940) for 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 statute that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Bill Clinton signed on 10/13/1994 was 85% the same as the Webman-Wright draft. I have also dealt with USERRA and the predecessor statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called 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. 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.

hassle, because it is necessary to accommodate the reservist's frequent absences from work for drill weekends, annual training, and voluntary or involuntary active duty.

Smith told me that discriminating against him in hiring violates something called "You Sarah." He referred me to your website and told me to contact you. What is this about?

A: Major Smith is referring to the Uniformed Services Employment and Reemployment Rights Act (USERRA). This is a federal law that is codified in title 38 of the United States Code, at sections 4301 through 4335.³ Section 4311(a) provides:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied *initial employment*, reemployment, retention in employment, promotion, or any benefit of employment on the basis of that membership, application for membership, performance of service, application for service, or obligation.⁴

USERRA most definitely applies to the Federal Government, as well as to state and local governments and private employers, regardless of size. USERRA's very first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."⁵

If the Federal Government is expected to be a model employer, the Air Force should be triply the model employer. The services (including the Air Force) are the principal beneficiary of USERRA. Without a law like USERRA, the services would not be able to recruit and retain a sufficient quality and quantity of Reserve Component (RC) and Active Component (AC)⁶ personnel to defend our country.

Only 25% of U.S. residents in the 17-24 age group are eligible for military service. The other 75% are disqualified by physical conditions (especially obesity and diabetes), educational deficiencies (no high school diploma), use of illegal drugs or certain prescription medications like Ritalin, felony convictions, and other problems. Only 1% of young Americans in this age group are both eligible for military service and willing to consider enlisting. The services need more than half of that 1% to meet their RC and AC recruiting goals each year.⁷ It is essential that all employers (especially the services themselves) comply with USERRA and go above and

³ 38 U.S.C. 4301-35.

⁴ 38 U.S.C. 4311(a) (emphasis supplied).

⁵ 38 U.S.C. 4301(b).

⁶ Yes, USERRA applies to persons joining the AC as well as the RC. Please see Law Review 0719 (May 2007).

⁷ Please see Law Review 14080, by Nathan Richardson and myself.

beyond USERRA in supporting employees and potential employees who serve in the RC or who are considering joining the RC.

Yes, having a National Guard or Reserve member as an employee can be something of a burden on civilian employers and supervisors and sometimes on the co-workers of those who serve.⁸ Congress was fully aware of that burden when it enacted USERRA. Congress determined that imposing the burden was warranted because of the nation's need to defend itself. The burdens imposed on civilian employers, supervisors, and co-workers are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform, in the RC or the AC.

I most respectfully submit that as an O-6 you have a duty to look at the big picture and act accordingly. You must not focus solely on your own administrative convenience in administering your little part of the Air Force. How do we get the gas station owner in your city to accommodate RC service by his or her employees or potential employees if the word gets out that the United States Air Force flouts USERRA?

Through an organization called Employer Support of the Guard and Reserve (ESGR)⁹ the Department of Defense advocates for civilian employers (federal, state, local, and private sector) to comply with USERRA and to go above and beyond USERRA in supporting employees and potential employees who are members of the National Guard or Reserve. Please recognize that "do as I say, not as I do" has always been a losing argument.

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

Judge not, that you be not judged. For with the judgment you pronounce you will be judged, and the measure you give will be the measure you get. Why do you see the speck that is in your brother's eye, but do not notice the log that is in your own eye? Or how can you say to your brother, "Let me take the speck out of your eye" when there is the log in your own eye? You hypocrite, first take the log out of your own eye and then you will see clearly to take the speck out of your brother's eye.¹⁰

⁸⁸ Please see Law Review 15093 (October 2015). The article is titled "Having a National Guard Member as an Employee Is a Pain, but you Can Handle it."

⁹ Please call ESGR at 800-336-4590, and please see the organization's website at www.esgr.mil.

¹⁰ *Gospel of Matthew*, Chapter 7, verses 1-5 (*Revised Standard Version*).