

## **Opportunity To Telecommute Is a Benefit of Employment Protected by USERRA**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

Update on Sam Wright

1.2—USERRA forbids discrimination

1.3.2.7—Adequate rest before and after service

**Q: I am a Lieutenant (O-3) in the Coast Guard Reserve (USCGR) and a member of the Reserve Officers Association (ROA). I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>3</sup>**

**Some years ago, the USCGR disestablished almost all of its Reserve units. USCGR reservists like me perform inactive duty training (drills) at Coast Guard active facilities, and we work directly with the regulars. My drill weekend is Friday-Sunday, and the place where I drill is 600 miles from my home. Accordingly, I need to miss work at my civilian job on Thursday (to travel to the drill site and get a reasonable night’s sleep Thursday night in order to be fit for duty Friday morning) and Monday (to return home from my drill weekend and be ready to return to work Tuesday morning).**

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<sup>1</sup> I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find almost 1500 “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. I am the author of more than 1300 of the articles.

<sup>2</sup> 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 I have been dealing with the federal reemployment statute (originally enacted in 1940) for 34 years.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. On 10/13/1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The 1994 version of USERRA 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 (DOD) organization called 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 at Tully Rinckey PLLC (TR), and as SMLC Director. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

On the civilian side, I am an Information Technology (IT) professional. I work for a company—let's call it Computers R Us (CRU). I am one of 20 IT professionals working for this company. Ms. Penny Dollar is the owner-operator of the company. Of these 20 IT professionals, I am the only one who is a member of a Reserve Component of the armed forces.

Most of my work is performed at the sites of the businesses that are CRU customers. Like my CRU colleagues (the other 19 IT professionals), I have been given the opportunity to work from home on most days. I log onto my computer at home early in the morning and learn my job assignments for the day. I travel from home to my first assignment and then to the subsequent assignments and return home in the evening. I only go to the CRU office when necessary for a meeting, training, or to pick up supplies or equipment. My 19 colleagues are all given this same privilege, which is very efficient for the individual employee and also for CRU.

Ms. Dollar (the CRU owner) has given me a hard time about my USCGR duties and the days that I miss work for these duties, although I have gone out of my way to minimize the burden on the company. I have given Ms. Dollar my USCGR drill schedule for the entire fiscal year, and only once did the unit change the schedule during the year.

Last month (April), Ms. Dollar got very annoyed with me for my absence from work April 7-11 (Thursday through Monday), although I gave her notice of this drill weekend in September 2015 (when I received my drill schedule for Fiscal Year 2016) and I reminded her of this drill weekend one month in advance.

Ms. Dollar said that I am "unreliable" and she terminated my telecommuting privileges. Now, unlike my 19 IT professional colleagues, I am required to report for work at the CRU office at 8 am each work day. I receive my assignments at the office, and I travel to the assignments then return back to the CRU office and leave there at the end of the work day, at 5 pm.

I think that I have been deprived of a valuable benefit (the opportunity to work from home, like my colleagues) *because of my USCGR duties*. Do you think that my USERRA rights have been violated?

A: Yes. I invite your attention to section 4311(a) of USERRA:

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* by an employer on the basis of that

membership, application for membership, performance of service, application for service, or obligation.<sup>4</sup>

Section 4303 of USERRA defines 16 terms used in this law. The definition of “benefit of employment” includes “the opportunity to select work hours or location of employment.”<sup>5</sup> I think that it is clear beyond cavil that the opportunity to work from home like your colleagues is a benefit of employment protected by USERRA and that CRU has denied you that benefit of employment because of your USCGR service.

Under section 4311(c)<sup>6</sup> you are not required to prove that your USCGR service was *the reason* that Ms. Dollar deprived you of this benefit of employment. You only need to prove that your performance of service was *a motivating factor* in the employer’s decision to deprive you of this benefit. If you prove that you win unless the employer can *prove* (not just say) that you would have (not just could have) been deprived of the benefit even if you had not been a member of the USCGR.

I think that you have ample evidence to prove that your USCGR service was, at a minimum, a motivating factor in the employer’s decision to deprive you of the opportunity to work from home. That evidence includes:

- a. The proximity in time between your exercise of USERRA rights (for the April drill weekend) and the employer’s decision.
- b. Ms. Dollar’s expressions of irritation about your USCGR duties and the inconvenience that your duties cause her.
- c. The fact that you are the only IT professional who participates in the RC, and you are the only one who has been deprived of the opportunity to work from home.

USERRA gives you the right to a leave of absence (unpaid but job protected) for the days that you perform military duty (Thursday-Sunday of a drill weekend) and also for the travel and rest time traveling to and returning from your drill weekend.<sup>7</sup>

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<sup>4</sup> 38 U.S.C. 4311(a) (emphasis supplied).

<sup>5</sup> 38 U.S.C. 4303(2).

<sup>6</sup> 38 U.S.C. 4311(c).

<sup>7</sup> Please see Law Review 15030 (March 2015).