

LAW REVIEW 16063¹

July 2016

USERRA Rights of the Wounded Warrior

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

Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments

1.1.3.1—USERRA applies to voluntary service

1.1.3.2—USERRA applies to regular military service

1.3.1.1—Left job for service and gave prior notice

1.3.1.2—Character and duration of service

1.3.1.3—Timely application for reemployment

1.3.2.1—Prompt reinstatement

1.3.2.2—Continuous accumulation of seniority—escalator principle

1.3.2.3—Pension credit for military service time

1.3.2.7—Adequate rest before and after service

1.3.2.9—Accommodations for disabled veterans

Q: I found some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) by doing an Internet search. Please advise me how USERRA applies, if at all, to my situation.

I graduated from Mudville High School in May 2005. Just days later, I took a job as a sanitation worker for the Sanitation Department, City of Mudville. I rode on the back of a garbage truck

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1500 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), 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 1300 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. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) 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 VRRA rewrite 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 USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 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. 4301-35). I have also dealt with the VRRA and USERRA 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 the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (May 2015), concerning the accomplishments of the SMLC. 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.

and picked up garbage cans and recycle cans and deposited the contents in the truck. I did that for more than two years.

In 2007, I got interested in military service and visited a recruiter. I joined the Army (Regular Army, not the Army Reserve or Army National Guard) and reported to boot camp on September 1, 2007. In June 2007, two years after I had started the Mudville job, I notified my direct supervisor and also the Mayor of the small city that I was joining the Army, and they held a party to honor my decision to serve the country. The party was held on August 15, 2007, which was my last day at the civilian job.

When I left the Mudville job in 2007, I had no idea that a federal law might give me the right to reinstatement in my civilian job after release from active duty and at that time going back to the garbage truck was the last thing on my mind. I had in mind the possibility of staying in the Army for 20 years or more to qualify for military retirement, and also the recruiter told me that my Army training would qualify me for a much better civilian job if I chose to leave active duty after serving honorably for four years or more.

My term of enlistment was for eight years, ending in 2015.³ My active duty commitment, under my enlistment contract, was four years, expiring in September 2011.

In May 2011, I was serving on active duty in combat in Afghanistan when I was seriously wounded. I lost my left arm and left leg and suffered internal injuries. As a result of my wounds, I did not leave active duty in September 2011. My active duty was extended for three years, until September 2014, while I had multiple surgeries and rehabilitation from the Army. I was processed for a disability retirement, and I left active duty by retirement on September 30, 2014. I was transferred directly from an Army hospital to a Department of Veterans Affairs (VA) regional medical center.

Over the last 22 months, since I left active duty, I have made great strides in learning to use my prosthetic left arm and leg and in my general rehabilitation. I am now ready to return to civilian work, although I recognize that I cannot return to the back of the garbage truck, with just one arm and one leg.

I did a lot of research on the Internet and found your “Law Review” articles about USERRA. With some help from my younger sister, who is a law student, I prepared a letter to the Mayor of Mudville, applying for reemployment, and I sent the letter by certified mail. The Mayor referred the matter to attorney I.R. Shyster of the law firm Dewey, Cheatham & Howe (DCH). Mr. Shyster prepared a 20-page memorandum on DCH letterhead, in which he made the following claims:

³ Since the early 1980s, the standard term of enlistment for all five armed forces has been eight years.

- a. This veteran (me) left his job to join the Regular Army, not the Army Reserve or Army National Guard. USERRA only applies to National Guard and Reserve service, not regular military service, so this veteran does not have the right to reemployment.
- b. This veteran does not have the right to reemployment because he did not tell us about USERRA when he left his civilian job in 2007.
- c. This veteran does not have the right to reemployment because he did not tell us, in 2007, that he planned to leave active duty and seek reemployment.
- d. This veteran does not have the right to reemployment because he left his job on August 15, 2007, 17 days before he entered active duty on September 1.
- e. This veteran does not have the right to reemployment because he is well beyond USERRA's five-year limit. By the time he applied for reemployment on July 1, 2016, he had been gone from his City of Mudville job for almost nine years.
- f. This veteran does not have the right to reemployment because he did not apply for reemployment within 90 days after he left active duty in September 2014.
- g. This veteran does not have the right to reemployment because there are no current vacancies in the Sanitation Department for which a man with one arm and one leg is qualified.

Is Mr. Shyster correct? Do I have enforceable USERRA rights against the City of Mudville?

A: Mr. Shyster is wrong on so many levels, and I will respond to each of his fallacious points in turn. But first, let me say “thank you” for your service to our country in the Army. It is not a cliché to say that “freedom is not free.” It is very expensive—in your case it cost you an arm and a leg. Almost all of the cost is borne by that tiny fraction of the U.S. population that is serving or has served our country in uniform—about $\frac{1}{4}$ of 1% of the population serves in uniform, in the Active Component (AC) or the Reserve Component (RC). The other 99.25%, including Mr. Shyster, make no contribution to national defense, beyond the payment of taxes.

USERRA applies to AC service, as well as RC service.

The federal reemployment statute has always applied to persons who leave civilian jobs for voluntary or involuntary service in the regular military, as well as the National Guard and Reserve. As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA). Congress enacted the VRRA in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my late father) for World War II.⁴

⁴ As originally enacted in 1940, the VRRA only applied to those who were drafted into military service. In 1941, as part of the Service Extension Act, Congress amended the VRRA to make it apply to voluntary enlistees as well as draftees. Almost from the very beginning, the reemployment statute has applied equally to voluntary as well as involuntary service. Today, all military service is essentially voluntary. Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military.

As I have explained in Law Review 15116 (December 2015) and other articles, a person who meets USERRA's five simple conditions has the right to reemployment. Those conditions are:

- a. 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.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded USERRA's cumulative limit on the duration of the period or periods of uniformed service, relating to the relationship for which the person seeks reemployment.
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, has made a timely application for reemployment.

As I explain in great detail below, I think that it is clear that you meet or can meet each of these five conditions, and that you have the right to reemployment with the City of Mudville. USERRA defines the term "service in the uniformed services" 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 and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from a position of employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.⁵

There is absolutely no basis for Mr. Shyster's claim that USERRA does not apply to folks (like you) who left a civilian job for regular military service.

When you left your job to join the Army in 2007, you were not required to tell the employer about USERRA, nor were you required to predict that you would be returning and seeking reemployment.

Sections 4304 and 4312 of USERRA⁶ set forth the five conditions for reemployment, including the requirement that "the person (or an appropriate officer of the uniformed service in which the service is to be performed) has given advance written or verbal notice of such service to such person's employer."⁷ You gave such notice, and that is all that you were required to do. You certainly were not required to give the City of Mudville a legal tutorial about its USERRA obligations.

⁵ Title 38, United States Code, section 4303(13), 38 U.S.C. 4303(13) (emphasis supplied).USERRA is codified at 38 U.S.C. 4301-35.

⁶ 38 U.S.C. 4304, 4312.

⁷ 38 U.S.C. 4312(a)(1).

Nor were you required to predict, when you left your job in 2007, that you would someday be returning to Mudville and seeking reemployment. The Department of Labor (DOL) USERRA Regulation provides as follows:

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 service?

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.⁸

Your departure from the Mudville job 17 days before your boot camp report date did not defeat your right to reemployment.

Mr. Shyster is clearly wrong when he asserts that your departure from the Mudville job on August 15 to report to boot camp on September 1 deprives you of the right to reemployment. The DOL USERRA Regulation provides:

If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.⁹

Although you have been gone from your Mudville job for almost nine years, you have not exceeded USERRA's five-year limit on the duration of the period or periods of uniformed service.

Section 4312(c) of USERRA¹⁰ sets forth USERRA's five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, and section 4312(c) also sets forth nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit. Service performed “during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person” does not count toward the five-year limit.¹¹

⁸⁸ 20 C.F.R. 1002.88 (bold question in original). The citation is to title 20 of the Code of Federal Regulations, section 1002.88.

⁹ 20 C.F.R. 1002.74(b).

¹⁰ 38 U.S.C. 4312(c).

¹¹ 38 U.S.C. 4312(c)(2).

Because of your serious wounds in 2011 in Afghanistan, and because of your continuing need for medical treatment, you were unable to obtain orders releasing you from active duty prior to September 2012 (five years after you entered active duty), and your inability was through no fault of your own. Accordingly, your period of active duty service, from September 2007 to September 2014, does not exceed the five-year limit, and you can have the right to reemployment.

You were not performing “service in the uniformed services” between August 15, 2007 (when you left your Mudville job) and September 1, 2007 (when you reported to boot camp), although this period of absence from your civilian job was “necessitated by uniformed service.” Similarly, you were not performing uniformed service between September 30, 2014 (when you were finally released from active duty) and July 1, 2016 (when you applied for reemployment). These periods do not count toward your five-year limit under section 4312(c) of USERRA.

Although you have been gone from the Mudville job for almost nine years, you have not exceeded the five-year limit, and you can have the right to reemployment.

Your July 1, 2016 application for reemployment was timely.

After a period of service of 181 days or more, the returning service member or veteran is required to submit an application for reemployment within 90 days after the date of release from service.¹² Under certain circumstances, the deadline to apply for reemployment can be extended. USERRA provides:

A person who is hospitalized for, *or convalescing from*, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, *at the end of the period that is necessary for the person to recover* from such illness or injury, report to the person’s employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), *such period of recovery may not exceed two years.*¹³

Your position should be that when you were released from active duty on September 30, 2014, you were hospitalized for and then convalescing from the serious injuries (wounds) that you received in Afghanistan in 2011. Your period of recovery lasted about 22 months and was within the 24-month maximum established by section 4312(e)(2)(A). You made a timely application for reemployment within 90 days after the end of your period of recovery. Your application for reemployment was timely.

You should be prepared to provide certain documentation to the City of Mudville.

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

¹³ 38 U.S.C. 4312(e)(2)(A) (emphasis supplied).

A service member or veteran who is applying for reemployment after a period of service of 31 days or more is required to provide to the employer, upon the employer's request, certain documentation. USERRA provides:

A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that –

- (A)the person's application [for reemployment] is timely;
- (B)the person has not exceeded the service limitations [the five-year limit] set forth in subsection (a)(2) (except as permitted under subsection (c)); and
- (C)the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.¹⁴

Documenting (C) will be easy. The DD-214 that you received on September 30, 2014 shows clearly that you served honorably and that you did not receive one of the disqualifying bad discharges enumerated in section 4304. Documenting (A) and (B) will be more difficult, but certainly not impossible.

You entered active duty in September 2007. Your five-year limit expired in September 2012. Your DD-214 should show that you were unable to obtain orders releasing from active duty in September 2012 and that such inability was through no fault of your own. If your DD-214 does not show that, you will need to obtain separate documentation from the Army showing that you were kept on active duty until September 2014 because of your combat wounds and your need for long-term medical care and rehabilitation. Obtaining such documentation should not be difficult, once you explain to the Army personnel officer why such documentation is necessary.

You were released from active duty September 30, 2014. Upon release, you were hospitalized for or convalescing from the wounds you received in Afghanistan in 2011, and your period of recovery lasted about 22 months. In order to establish that your July 1, 2016 application for reemployment was timely, you will need to document these facts. A memorandum signed by your principal VA physician would likely be the best way to document these facts.

The City of Mudville is required to make reasonable efforts to accommodate your serious service-connected disabilities.

USERRA provides as follows concerning the obligations of the pre-service employer to the returning disabled veteran who meets the five USERRA conditions:

¹⁴ 38 U.S.C. 4312(f)(1). It is unlawful for the employer to delay or defeat reemployment by demanding documentation that does not exist or that is not reasonably available to the service member or veteran. 38 U.S.C. 4312(f)(4). Please see Law Review 16027 (April 2016).

In the case of a person who has a disability incurred in, or aggravated during, such [uniformed] service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

(A) [The person shall be reemployed] in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform *or would become qualified to perform with reasonable efforts by the employer*; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.¹⁵

Because you meet the five USERRA conditions, the City of Mudville is required to reemploy you promptly¹⁶ in the position of employment that you would have attained if you had been continuously employed.¹⁷ The City of Mudville is required to make reasonable efforts to accommodate your disabilities in the back-of-truck position. I think that it is very likely that the City will be able to show that there is no accommodation that it can reasonably make that would enable a person with one arm and one leg to ride safely on the back of a garbage truck.

Because you cannot return to the back-of-the-truck position, the City of Mudville is required to reemploy you in another position for which you are qualified *or can become qualified with reasonable employer efforts*. The employer is the *City of Mudville* (the city government as a whole), not just the Sanitation Department. In searching for an appropriate position for you, the City must examine *all positions, not just those that are currently vacant. You are entitled to reemployment, even if that means displacing another city employee.*¹⁸

Because you meet the five USERRA conditions, the City of Mudville is required to reemploy you as a clerk in the tax office, or as an assistant librarian, or in some other position for which you can become qualified with reasonable employer efforts.

Upon reemployment, you are entitled to 11-plus years of City of Mudville seniority and pension credit.

In its first case construing the VRRA, the Supreme Court enunciated the “escalator principle” when it held: “The returning veteran does not step back on the seniority escalator at the point he

¹⁵ 38 U.S.C. 4313(a)(3) (emphasis supplied).

¹⁶ Prompt reemployment means that the person must be back on the payroll within two weeks after the application for reemployment, except in unusual circumstances. 20 C.F.R. 1002.181.

¹⁷ The position that you would have attained if you had been continuously employed is probably the back-of-the-truck position that you left, but it may be that you can show with reasonable certainty that you would have been promoted to the front-of-the-truck position (driver) if you had remained continuously employed.

¹⁸ Please see Law Review 0640 (December 2006) and Law Review 0854 (November 2008).

stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.”¹⁹ The escalator principle is codified in section 4316(a) of USERRA.²⁰

In accordance with section 4318 of USERRA, you are entitled to be treated *as if you had been continuously employed* by the city for the entire time that you have been away from work for service (September 2007) until the city properly reemploys you now), for purposes of determining when you qualify for your city pension and for determining the amount of your monthly pension check.²¹

USERRA’s legislative history provides:

Section 4303(12) would define “seniority” to mean longevity in employment, including the period of employment prior to military service, the time between leaving the job and entering military service, the period of military service, and the time between discharge or release from military service and reemployment.²²

Upon reemployment, you are entitled to City of Mudville seniority and pension credit for all of the following periods:

- a. The period of 26 months, from June 2005 to August 2007, when you were working for the City of Mudville Sanitation Department.
- b. The period of 17 days, between August 15, 2007, when you left your City of Mudville job, and September 1, 2007, when you reported to active duty.
- c. The period of seven years, between September 2007, when you reported to active duty, and September 2014, when you were released from active duty.
- d. The period of 22 months, between September 30, 2014, when you were released from active duty, and July 1, 2016, when you applied for reemployment, after completion of your recovery from the wounds you sustained in Afghanistan in 2011.
- e. The period of delay caused by the City of Mudville, between July 1, 2016 (when you applied for reemployment) and the date when the city finally permits you to return to work.

Your right to 11-plus years of seniority and pension credit at the City of Mudville is a factor that you should consider carefully in deciding whether you want to assert your right to reemployment with the city or whether you want to find a job with another employer and move on with your life. If the City of Mudville offers you a global cash settlement, the money offered should include the value of the seniority and pension credit that you are foregoing.

¹⁹ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

²⁰ 38 U.S.C. 4316(a).

²¹ Please see Law Review 16053 (June 2016), Law Review 16038 (May 2016), Law Review 16032 (April 2016), Law Review 16030 (April 2016), Law Review 16025 (April 2016), and Law Review 15082 (September 2015), concerning section 4318 of USERRA.

²² House Committee Report Number, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. This paragraph can be found on page 664 of the 2016 edition of the *Manual*.