

LAW REVIEW 16093¹

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Section 4312(e)(1)(A) Authorizes a Delay in your Application for Reemployment; It Does not Give you Two Years off from Work.

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Update on Sam Wright

- 1.1.1.8--USERRA applies to Federal Government
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Q: I am a Specialist in the Army National Guard (ARNG), retired in late 2014 with a service-connected disability of 100%. Several years ago, I was a federal civilian employee and a traditional ARNG member when I was recalled to active duty, with my ARNG unit, and deployed to Afghanistan. I was wounded in action and received a Purple Heart. My wounds were quite serious, and I was retained on active duty for several years for medical treatment,

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 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 these articles. More than 1000 of the articles are about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related laws. As is explained in Law Review 15067 and other laws, Congress enacted USERRA (Public Law 103-353, 108 Stat. 3162) and President Bill Clinton signed it into law 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA—Public Law 76-783, 54 Stat. 885). 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. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35).

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, and for six years (2009-15) I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. I invite the reader's attention to Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have been dealing with the VRRA and USERRA 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. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. 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, and as SMLC Director. Since ROA disestablished the SMLC last year, I have continued the work of the SMLC as a volunteer and ROA member. I am available by telephone at (800) 809-9448 extension 730 and by e-mail at SWright@roa.org.

rehabilitation, and processing for a disability retirement. Finally, I was released from active duty with a disability retirement of 100% on November 15, 2014.

The next month, I contacted the federal agency where I had worked. The agency put me back on the payroll. I told the personnel office that the Uniformed Services Employment and Reemployment Rights Act (USERRA) gives me the right to take two years off, with pay, to rehabilitate from my wounds. The agency reluctantly put me back on the payroll and gave me time off from work for my rehabilitation. Recently, the agency ordered me back to work and threatened to fire me if I don't report back to work by Monday, September 18, 2016. I protested that I still have two months to go on my two-year rehabilitation period, but the personnel office has refused to rescind the back-to-work order. Help!

A: You are misunderstanding the relevant subsection of USERRA.³ *USERRA does not give you two years of time off with pay to rehabilitate.* I decided to write this article because you are not the first service member that I have heard from who has made this fundamental error in understanding USERRA. Unfortunately, I do not have the power to “turn back the hands of time” so I cannot help you undo the mistake you made, but I hope that by this article I can help other Reserve Component (RC) service members to avoid the mistake that you have made.

As I explained in Law Review 15116 (December 2015) and many other articles, a person has the right to reemployment under USERRA if he or she meets five simple conditions:

- 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, as defined by USERRA.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded the cumulative 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.⁴
- d. Served honorably and was released from active duty 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.

³ The relevant subsection is 4312(e)(2)(A), 38 U.S.C. 4312(e)(2)(A)

⁴ Under section 4312(c) of USERRA, there are nine exemptions from the five-year limit—that is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016) for a recent detailed discussion of USERRA's five-year limit—what counts and what does not count in exhausting an individual's limit.

It is necessary to meet all five of these conditions in order to have the right to reemployment. This includes having made a timely application for reemployment with the pre-service employer, after release from the period of service.

After a period of service of 181 days or more, the returning service member or veteran normally has 90 days to apply for reemployment.⁵ Section 4312(e)(2)(A) provides that under certain very limited circumstances the deadline to apply for reemployment can be extended by *up to two years*.⁶ Section 4312(e)(2)(A) provides as follows:

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*.⁷

Under section 4312(e)(2)(A), you had the right to delay your application for reemployment until the expiration of your recovery period.⁸ When you applied for reemployment and returned to work in December 2014, a month after you left active duty, *you effectively waived the right to delay your application for reemployment*.

Section 4313(a)(3) of USERRA deals with the obligations of the pre-service civilian employer in the case of a person *who meets the five USERRA conditions* and who seeks to return to work with a disability incurred or aggravated during the period of service. That subsection provides as follows:

In the case of a person who has a disability incurred in, or aggravated during, such 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—

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

⁶ In most cases, the period of authorized delay in applying for reemployment will be less than two years. For example, Joe Smith suffered a compound fracture of his left leg in the line of duty, while on active duty. His period of hospitalization and convalescence, after leaving active duty, was six months. Thus, the authorized delay of Joe's application for reemployment is six months, not two years.

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

⁸ The recovery period can be up to two years but in most cases will be for a shorter period.

- (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), [the person shall be reemployed] in a position which is the nearest approximation to the position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.⁹

The employer is only required to make *reasonable* efforts for the returning disabled veteran who meets the five USERRA conditions. Efforts that would impose an "undue hardship" on the employer are not reasonable and are not required. Section 4312(d)(1)(B) provides:

An employer is not required to reemploy a person under this chapter if-- ... (B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an *undue hardship* on the employer.¹⁰

This is an affirmative defense for which the employer bears a heavy burden of proof.¹¹ The fact that the Army or the Department of Veterans Affairs (VA) has rated your service-connected disability at 100% does not necessarily mean that you are forever precluded from any civilian employment;¹² however, the 100% rating clearly shows that your disability is very serious. It may be that the employer will be able to establish the "undue hardship" affirmative defense.

⁹ 38 U.S.C. 4313(a)(3) (emphasis supplied). Please see Law Review 0640 (December 2006), Law Review 0854 (November 2008), and Law Review 16063 (July 2016) for a detailed discussion of the rights of the returning disabled veteran *who meets the five USERRA conditions* and the obligations of the pre-service employer in this situation.

¹⁰ 38 U.S.C. 4312(d)(1)(B) (emphasis supplied).

¹¹ Please see Law Review 16037 (May 2016) for a detailed discussion of USERRA's three affirmative defenses.

¹² The 100% rating means that you are 100% precluded from performing your *military duties*. Your qualification for a civilian job is a different matter.