

## LAW REVIEW 16099<sup>1</sup>

September 2016

### The Client Is Responsible for Court Costs as Incurred

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Update on Sam Wright

- 1.1.1.7—USERRA applies to state and local governments
- 1.1.2.1—USERRA applies to persons holding part-time, temporary, probationary, or at-will jobs
- 1.1.3.3—USERRA applies to National Guard service
- 1.2—USERRA forbids discrimination
- 1.4—USERRA enforcement
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a noncommissioned officer in the Air National Guard (ANG). By doing an Internet search, I found some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>3</sup> I worked for a local government entity, and was terminated during my probationary period for taking time off from work for ANG training and service.<sup>4</sup>**

**I promptly complained to the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), asserting that the employer fired me because of my ANG duties and the absences from work that were necessitated by those duties. DOL-VETS did an “investigation” that basically consisted of asking for the employer’s side and accepting as gospel the legal and factual assertions of the employer’s attorney. DOL-VETS closed my case as “without merit” but I remain convinced that my case did have merit.**

**I contacted several local attorneys before I found one who seemed to be familiar with USERRA. She thought that my case had a lot of merit, and she agreed to represent me on a “contingent fee basis.” She told me that I did not owe her anything (after the small retainer I**

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<sup>1</sup> Please see [www.servicemembers-lawcenter.org](http://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 the articles.

<sup>2</sup> BA 1973 Northwestern University, JD 1976 University of Houston Law School, LLM 1980 Georgetown University Law Center. 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 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. Although I am no longer employed by ROA, I have continued the work of the SMLC on a part-time voluntary basis. You can reach me through ROA at (800) 809-9448, extension 730, or. SWright@roa.org.

<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).

<sup>4</sup> USERRA definitely applies to persons holding probationary jobs. Please see Law Review 0621 (July-August 2006).

paid) for attorney fees unless and until we prevailed and collected money from the defendant employer, and in that case she would receive a percentage of the recovery if we settled before trial or if we proceeded to trial and we won. I signed a multi-page “retainer agreement” with the attorney. She did an excellent job of representing me, including obtaining a favorable preliminary decision that has been cited by other USERRA court decisions regarding the application of USERRA to political subdivisions of a state.

She filed the lawsuit and we proceeded into the “discovery” process, which eventually included her needing to take depositions of certain officials of the local government and the defendant taking my deposition. The lawyer told me that for the depositions she was taking there were substantial costs, to pay the court reporter who would transcribe the questions and answers. She told me that it was necessary for me to pay those costs up front.

Since I was unemployed and living on my ANG drill pay, I could barely afford to pay the mortgage and put food on the table for my family. There was no way that I could pay those costs. She told me that the “state bar ethics rules” precluded her from advancing the costs to me.

Because I was unable to come up with the cost of paying for a court reporter to transcribe depositions, the lawsuit ground to a halt. My former employer proposed an “Offer of Judgment” that was a pittance of my losses. I accepted the agreement, and the memo accompanying the settlement check included a paragraph saying that I was accepting this small payment in “full and final settlement of the referenced matter.”

I have tried mightily to find another good-paying job in my home town, without much success. I have made many applications but have received no job offers. The only way that I have been able to stay afloat financially is by taking multiple active duty tours from the Air Force, ANG drill pay and the housing allowance provided by the Post-9/11 GI Bill I applied for to return to college and learn a new skill. These tours have taken me overseas in support of combat operations going on in Iraq and Afghanistan, among others. I am separated from my family for months at a time, often in less-than-ideal conditions. Help!

**A:** As the Director of the Service Members Law Center (SMLC) from 2009 to 2015, and as a volunteer for the Reserve Officers Association (ROA) since then, I frequently hear sad stories like yours. I regret to say that there is nothing that I can do for you. You are bound by the settlement agreement that you signed and by the dismissal of the lawsuit, based on the settlement.

The doctrine of *res judicata* applies. That is Latin for “the thing has been adjudicated.” There must be finality in litigation. When you lose in the trial court, you can appeal to an appellate court, but only for a very limited time. If you let the time pass without appealing, or if you

appeal and lose in the appellate court, the case is over and cannot be refiled. In your situation, your case ended when you signed the settlement agreement and your case was dismissed by the court.

USERRA is a great law with some strong pro-plaintiff provisions that are rare or unprecedented in other employment laws. In civil litigation generally, each side pays its own costs<sup>5</sup> and at the end of the lawsuit (if it proceeds to trial) the court orders the loser to pay the court costs incurred by the winner. In a USERRA case, the plaintiff (the service member or veteran claiming that his or her USERRA rights were violated) cannot be required to pay the defendant's court costs, even if the defendant wins.<sup>6</sup>

In a USERRA case, if you proceed to trial with private counsel (your own attorney) and prevail, the court can order the employer to pay your reasonable attorney fees, expert witness fees, and other costs.<sup>7</sup> USERRA does not have a provision that exempts the plaintiff from having to pay court costs (like the court reporter's fee for transcribing a deposition) as those costs are incurred.

I know USERRA plaintiff attorneys who routinely advance these costs to the client (plaintiff), but only where permitted by state bar ethics rules. In some states it is permissible for the attorney to advance the court costs under circumstances of this nature. In other states, including your state, the state bar ethics rules forbid the attorney to advance the costs. You cannot expect your attorney to violate the ethics rules and risk losing her law license.

There really is no solution to your problem, at this point. You are stuck with the settlement that you signed. You cannot reopen the case to obtain additional relief (money or reinstatement) from the employer. You need to learn the hard lessons and move on with your life.

I am writing this article to help other Reserve Component (RC) personnel learn from these hard lessons without having to pay the cost that you have paid. When you retain an attorney to represent you in a USERRA case or any other kind of case, the attorney will ask you to sign a retainer agreement, and the attorney will not undertake to represent you unless and until you sign the agreement. As with any contract, you need to read the agreement carefully and understand it fully before you sign. The attorney will, I am sure, be willing to explain the terms to you before you sign on. There may be some room for negotiation with the attorney as to the terms of the retainer agreement, but you cannot expect the attorney to sign an agreement that violates the relevant ethics rules.

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<sup>5</sup> These costs include the cost of hiring a court reporter to transcribe depositions, the costs of attorney travel to conduct or participate in depositions, and other out-of-pocket costs in filing and proceeding with a lawsuit as the plaintiff or defendant.

<sup>6</sup> 38 U.S.C. 4323(h)(1).

<sup>7</sup> 38 U.S.C. 4323(h)(2).

Going into this process, you need to understand your financial obligations, and you need to come up with a plan to pay those obligations. If you cannot come up with a realistic plan, you should not sign the retainer agreement and you should not file the lawsuit.

**Q: I blame DOL-VETS for my predicament. That agency’s “investigation” of my USERRA complaint basically consisted of sending a letter to the employer, attaching a copy of the complaint that I had filed. The employer’s attorney sent a written response that contained a lot of lies about the facts and incorrect assertions about the law (USERRA). The DOL-VETS “investigator” accepted the attorney’s assertions as gospel, conducted some poorly handled interviews and closed my case as “without merit.” Nearly all the evidence I provided him to consider was never investigated. I think that DOL-VETS should be required to reopen my case and conduct a proper investigation this time. What do you think?**

**A:** I have seen cases where the national leadership of DOL-VETS has ordered the reopening of a USERRA case, so that a proper investigation can be done. That option is not available in your situation. The doctrine of *res judicata* applies to DOL-VETS just as it applies to you. Your case is over and cannot be reopened.

I entirely agree with you that DOL-VETS investigations are sometimes slipshod and unsatisfactory and sometime meritorious cases are closed by DOL-VETS as “no merit.” I have made this point in several of our published “Law Review” articles.<sup>8</sup>

I invite your attention specifically to Law Review 0758 (November 2007) and Law Review 13126 (September 2013). Those articles deal with the case of Gerald Delay, an Air Force Reservist.

At the time he was called to active duty, Delay worked for a very small plumbing and heating company in the State of Washington.<sup>9</sup> Delay left his civilian job when called to active duty by the Air Force, and he met the USERRA conditions for reemployment.<sup>10</sup> Timothy Hayes, the owner of the plumbing and heating company, reinstated Mr. Delay in a part-time position (only 30 hours per week) although he had been working 40 hours per week before he was called to the colors and the other employees were still working 40-hour weeks.

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<sup>8</sup> Please see Law Reviews 0611, 0701, 0758, 1152, 1181, and 13126.

<sup>9</sup> Unlike other federal employment laws, USERRA applies to very small employers. You only need one employee to be an “employer” for purposes of USERRA. See *Cole v. Swint*, 961 F.2d 58 (5<sup>th</sup> Cir. 1992).

<sup>10</sup> Delay left his civilian job for the purpose of performing uniformed service, and he gave the employer prior notice. He did not exceed the cumulative five-year limit on the duration of his period or periods of uniformed service, relating to his employer relationship with the plumbing and heating company. He served honorably and was released from active duty without having received a disqualifying bad discharge from the Air Force. After release, he made a timely application for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of USERRA’s reemployment conditions.

Some months later, Mr. Delay visited an Air Force legal assistance attorney. The attorney sent a letter to Mr. Hayes, the company owner, suggesting that under USERRA Mr. Delay was entitled to a full-time position of 40 hours per week. Mr. Hayes received the letter and fired Mr. Delay an hour later.

Mr. Delay filed a formal written USERRA complaint with DOL-VETS. He alleged that the employer violated USERRA by reinstating Mr. Delay in a part-time position when he was entitled to a full-time position and then violated USERRA again by firing him for complaining about the alleged USERRA violation.

DOL-VETS conducted an investigation. Mr. Hayes provided copies of “business records” of the company purporting to show that in the months after he returned from active duty Mr. Delay was repeatedly guilty of insubordination and sloppy work. Based on these records, Mr. Hayes convinced the DOL-VETS investigator that Mr. Delay was fired legally for insubordination and sloppy work and that it was a coincidence that the firing occurred just one hour after Mr. Hayes received the letter from the Air Force legal assistance attorney.

After DOL-VETS closed Mr. Delay’s case as “without merit,” Mr. Delay retained an excellent attorney, James Beck of Tacoma, Washington. By means of the Freedom of Information Act (FOIA), attorney Beck obtained the DOL-VETS investigative file. Reviewing the file, Mr. Beck noticed something very interesting. The first “business record” purporting to show insubordination and sloppy work was dated February 29, 2005. But 2005 was not a leap year, and February had only 28 days that year.

Mr. Beck filed suit on behalf of Mr. Delay and won. In the trial, Mr. Beck proved to the jury that Mr. Hayes created the “business records” only after Mr. Delay complained to DOL-VETS. The allegations of insubordination and sloppy work were lies made up by Mr. Hayes to convince DOL-VETS to close the case. The agency relied on those lies in closing the case as “without merit.” The jury found for Mr. Delay, and the court awarded him \$146,000 in back pay and another \$146,000 in liquidated damages.<sup>11</sup>

When you file suit in federal court under a federal statute like USERRA, you can bring closely related state law claims, along with your federal law claim, in federal court.<sup>12</sup> On behalf of Mr. Delay, Mr. Beck brought a state law claim of defamation against Mr. Hayes, and the jury awarded him an additional \$250,000 on the defamation claim. Mr. Hayes defamed Mr. Delay by

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<sup>11</sup> Under USERRA, the court is to award the successful plaintiff liquidated damages in the amount of the actual damages, and in addition to those damages, if the court finds that the defendant violated USERRA willfully. 38 U.S.C. 4323(d)(1)(C).

<sup>12</sup> See 28 U.S.C. 1367(a). This concept is called “supplemental jurisdiction.” I discuss the application of supplemental jurisdiction to USERRA cases in Law Review 0909 (February 2009) and Law Review 1173 (September 2011).

making up lies about him, alleging insubordination and sloppy work, and by creating phony “business records” in support of the lies.

I believe that in some cases DOL-VETS investigations are sloppy and incomplete and that some meritorious USERRA cases are closed by that agency as “without merit.” I have said this in many of my “Law Review” articles. I have also made it a point to praise DOL-VETS and the United States Department of Justice (DOJ), in cases where they do well.<sup>13</sup>

I entirely agree with you that there is a need for improvement by DOL-VETS in conducting proper investigations of USERRA claims and in supporting meritorious claims by veterans and RC personnel.<sup>14</sup> At your request, and at my suggestion, the Executive Director of ROA (Major General Jeffrey E. Phillips, USA (Ret.)) has written a letter to the Honorable Michael H. Michaud, the new Assistant Secretary of Labor for Veterans’ Employment and Training and head of DOL-VETS.<sup>15</sup>

As I have explained, your case cannot be reopened because the results of your case are “baked in” by the settlement agreement that you signed. General Phillips has asked Assistant Secretary Michaud to conduct an “autopsy” on your case, with a view toward improving upon the service that DOL-VETS provides to veterans and RC personnel going forward. We cannot turn back the hands of time, but we can learn lessons, make improvements, and move forward.

Thank you for your service to our country in the Air Force and the Air National Guard.

## **UPDATE: JANUARY 2017**

### **Potential USERRA Changes Discussed**

In December, ROA and outgoing Department of Labor Assistant Secretary for Veterans’ Employment & Training Service Michael Michaud met at ROA to discuss potential changes to USERRA that would benefit reservists. Assistant Secretary Michaud has already gotten back to us and indicated they will move forward with some of our suggestions. Assistant Secretary Michaud, former ranking member in the House Committee on Veterans’ Affairs, felt that ROA’s suggestions had such merit, he wanted to get movement going before his departure. More to follow!

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<sup>13</sup> Please see Law Review 16079 (August 2016) and Law Review 16050 (June 2016).

<sup>14</sup> Please see Law Review 16080 (August 2016) for a detailed discussion of the USERRA provisions about filing claims with DOL-VETS, requesting referral to DOJ, and the enforcement alternatives of the claimant in various scenarios.

<sup>15</sup> Like all federal executive appointees at the Assistant Secretary level and above, Mr. Michaud was appointed by the President with Senate confirmation. He represented the Second Congressional District of Maine in the United States House of Representatives from 2003 to 2015, and he was the Ranking Member of the House Veterans’ Affairs Committee from 2012 to 2015.