

## LAW REVIEW 16100<sup>1</sup>

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### Don't Do Military Duty on a Sick Leave Day

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Update on Sam Wright

1.1.3.3—USERRA applies to National Guard service

1.2—USERRA forbids discrimination

1.3.1.1—Left job for service and gave prior notice

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1.3.2.11—Vacations, holidays, and days off

1.8—Relationship between USERRA and other laws/policies

**Q: I am a Major in the Air National Guard 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>**

**On the civilian side, I am a pilot for a major airline. Recently, I woke up with a bad cold one morning, on a day when I was scheduled to fly for the airline. I took some cold medicine and**

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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 more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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. Although I am no longer employed by ROA, I have continued writing new "Law Review" articles as a volunteer and ROA member. I am available by e-mail at [SWright@roa.org](mailto:SWright@roa.org) or by telephone at (800) 809-9448, extension 730.

<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). 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), which was originally enacted in 1940. I have been dealing with the VRRA and USERRA for more than 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 Bill Clinton signed into law on 10/13/1994 (Public Law 103-353) 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 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 the SMLC Director.

**then called in sick to the airline, because Federal Aviation Administration (FAA) rules make it clear that a pilot is not to fly after having taken cold medicine or while suffering from a cold. Later that same day, I performed four hours of Air National Guard (ANG) inactive duty training (one drill) at our local Air Force Base.**

**Somehow, the airline's personnel office discovered that I had performed military duty on a day when I had called in sick to the airline, and the company is threatening to discipline me, perhaps even to fire me. Help!**

**A: If you had contacted me at the time, I would have strongly advised you *not to perform military duty on a sick leave day*. The appearance of this practice is unfavorable. If you are too sick to work at your civilian job, how can it be that you are not too sick to perform military duty on the same day?**

**Q: I called in sick to the airline because I had a bad cold and had found it necessary to take cold medicine. I could not safely fly an aircraft on that day. I was not scheduled to fly and did not fly during the four-hour drill that I performed for the Air Force later that day.**

**A: Good. You should make that argument to save your job. But in retrospect it would have been much better if you had not performed military duty on a sick leave day. Going forward, I strongly advise all Reserve Component (RC) personnel *do not under any circumstances perform military duty on a day when you have called in sick to your civilian employer*.**

**Q: In more than one of your “Law Review” articles you have written that an RC member has the right to use vacation, annual leave, or sick leave for military duty in order to keep the civilian income flowing in. Are you changing what you have written?**

**A: No. I have never written or said that an employee has the right to use sick leave for military duty. In many articles and speeches, I have written and said that the RC member has the right to use vacation or annual leave *but not sick leave* for military duty.**

The pertinent subsection of USERRA is as follows:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any *vacation, annual, or similar leave with pay* accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual or similar leave during such period of service.<sup>4</sup>

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<sup>4</sup> 38 U.S.C. 4316(d) (emphasis supplied).

The pertinent subsection of the Department of Labor (DOL) USERRA Regulation is as follows:

If employment is interrupted by a period of service, the employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, *the employee is not entitled to use sick leave* that accrued with the civilian employer during a period of service in the uniformed services, unless the employer allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. *Sick leave is usually not comparable to annual leave or vacation leave*; it [sick leave] is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.<sup>5</sup>

**Q: At this airline and other major airlines, pilots are frequently paid for “reserve” service for the airline. A pilot on “reserve” on a particular date is not scheduled to fly on that date, but he or she must remain available by telephone and can be called in to work if a scheduled pilot calls in sick or is otherwise unavailable. More than once, I have performed inactive duty training (drills) at the Air Force Base on days when I was working “reserve” for the airline.**

**I have been mentored by a senior airline pilot who is a retired Air Force Reserve Colonel and life member of ROA. He told me that our airline has a strict rule against doing military duty while on a “reserve” day for the airline. He told me that more than one RC member has been fired by this airline for doing this.**

**I think that this rule is unfair and unlawful. My doing inactive duty training on a “reserve” day in no way makes me unavailable to respond to a call from the airline. My ANG commanding officer has assured me that in the unlikely event that I am called by the airline I can immediately “clock out” from my drill and report to the airline. Moreover, the airline does not try to prevent other pilots (who are not active RC participants) from engaging in other money-making activities on “reserve” days. Help!**

**A: If you can show that the airline treats less harshly pilots who engage in non-military money-making activities on “reserve” days than it treats pilots who perform uniformed service on those days, you can challenge the discipline under section 4311(a) of USERRA.<sup>6</sup> Having said that, let me quickly add that I think that it is a bad idea to perform uniformed service on such a “reserve” day, just as it is a bad idea to do military duty on a sick leave day.**

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<sup>5</sup> 20 C.F.R. 1002.153(a) (emphasis supplied).

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

When you are on “reserve” for the airline, you are on the clock as an airline employee, although you likely have not left your own home. Performing military duty or doing activity intended to help your RC unit while on the clock for your civilian employer is a very bad idea and is not protected by USERRA.<sup>7</sup>

**Q: Josephine Smith is an enlisted member of my ANG unit. She works for our county government and has a standard work schedule that runs from 8 am until 5 pm Monday-Friday, holidays excluded. Our ANG drill weekend starts at 7 am Saturday and is over at 4:30 pm on Sunday. The Air Force Base where we drill is just 100 miles from Josephine’s home and civilian job. In the nine years that Josephine has worked for the county, not once has she been asked to come in to work on a weekend. On Saturday mornings of drill weekends, Josephine wakes up at her home and drives 100 miles to our drill site, and she has never failed to be there for the 7 am muster. On Sunday afternoon at 4:30 pm, Josephine and the other unit members are dismissed, and she then drives home, and she reports to work at the county job by 8 am Monday, with no problem.**

**There is no conflict between Josephine’s drill weekends and her civilian job, so Josephine is not required to give her employer notice of our drill weekend, right?**

**A: Under these circumstances, Josephine is not required to give notice to the county, her civilian employer, of her drill weekend.<sup>8</sup> Nonetheless, *I strongly urge Josephine and others to give notice to their civilian employers of the drill weekend.***

After a period of service lasting fewer than 31 days, the RC member is required to report back to his or her civilian employer as follows:

(i)not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person’s residence; or (ii) *as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.*<sup>9</sup>

Let us say that on Sunday afternoon of the drill weekend there has been a severe ice storm. At 4:30 pm, when the drill weekend is over, the highway has been closed because of the ice storm.

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<sup>7</sup> See *Escher v. BWXT 7-12 LLC*, 627 F.3d 1020 (6<sup>th</sup> Cir. 2010). I discuss *Escher* in detail in Law Review 1054.

<sup>8</sup> Prior notice to the civilian employer is only required when “absence from a position of employment is necessitated by reason of service in the uniformed services.” 38 U.S.C. 4312(a).

<sup>9</sup> 38 U.S.C. 4312(e)(1)(A) (emphasis supplied).

It is impossible or unreasonable for Josephine to return to her home Sunday evening and to her civilian job Monday morning, and the impossibility is no fault of Josephine's.

If Josephine gave her civilian employer notice that she would be performing inactive duty training that weekend, her inability to show up for work at 8 am on Monday is excused by section 4312(e)(1)(A)(ii). If Josephine did not tell her employer that she would be drilling that weekend, section 4312(e)(1)(A)(ii) arguably does not apply. Accordingly, I recommend that the RC member give notice to his or her civilian employer of drill weekends even if there is no direct time conflict between the drill weekend and the civilian job schedule.

**Q: As a member of the ANG, I am away from my civilian job at the airline for voluntary and involuntary training and service under title 10 and title 32 of the United States Code. I am also subject to being called by the Governor of the state for state active duty, for fires, floods, riots, etc. Does USERRA protect my civilian job under all of these scenarios?**

**A:** USERRA protects your civilian job when you are away from the job for voluntary or involuntary duty or training under title 10 or title 32. USERRA does not apply to state active duty.

Every state has a state law that protects the civilian jobs of National Guard members on state active duty. Some of these laws are much better than others. Please see our "state leave laws" section at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). For each state, you will find an article about the state laws that protect the civilian jobs of National Guard members when they are on state active duty.

**Q: As an airline pilot, I can be on the ground in several states in a single day, and I fly through the air of several other states. Which state's law applies to my relationship with my airline employer?**

**A:** The controlling state law is that of your airline "domicile." This is the airport where your airline journeys normally start and conclude.