LAW REVIEW 16101[1]
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USERRA in the Virginia Supreme Court

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Update on Sam Wright

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***Huff v. Office of the Sheriff,* 2013 WL 6018988 (W.D. Virginia Nov. 13, 2013), *motion to review denied* 2014 WL 352199 (W.D. Virginia 2014).**

***Huff v. Michael G. Winston, Sheriff of Roanoke County,* 2016 WL 4743470 (Virginia Supreme Court Sept. 8, 2016).**

Pamela Ennis Huff was an enlisted member of the United States Army Reserve (USAR) when she was hired by the Roanoke County Sheriff's Office as a Deputy Sheriff in November 2001. In December 2009, she was working as a Deputy Sheriff Bailiff when the Army called her to active duty and deployed her to Afghanistan. She was wounded in action, suffering a broken nose, injuries to her hip and spine, and a concussion, resulting in a traumatic brain injury. In April 2011, while she was still on active duty, she was diagnosed with post-traumatic stress disorder (PTSD) and major depressive disorder.

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[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), 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.

[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. 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 or by telephone at (800) 809-9448, extension 730.

Huff was released from active duty in May 2011. Shortly thereafter, she contacted the Sheriff regarding reemployment, and she returned to work as a Deputy Sheriff Bailiff in July 2011. After returning to work, she received regular treatment at the Salem Medical Center of the United States Department of Veterans Affairs (VA). Despite the treatment, she continued to suffer from PTSD and depression related symptoms during her employment. After certain incidents came to the Sheriff's attention, she was twice required to undergo "Fitness for Duty Evaluations." The Sheriff deemed Huff fit for duty on both occasions.

In August 2011, Huff requested unpaid leave on Fridays due to her ongoing counseling sessions held on Thursday evenings. The Sheriff advised her that he could not provide unpaid leave to her every Friday if she remained in the Court Services Division. He offered her Fridays off if she agreed to transfer to the Corrections Division, where scheduling flexibility was less difficult for the employer. Huff regarded the transfer as a demotion and she rejected it.

The Sheriff offered Huff the opportunity to take 30 days off, without pay, under the Family Medical Leave Act (FMLA), and she took that leave, beginning in late November 2011. After this leave period, she returned to work on a full-time "light duty" basis. In March 2012, she suffered a heart attack, and her treating physician deemed to be "service related." After the heart attack, Huff went on disability leave.

She returned to work on October 22, 2012. The Sheriff fired her in late January 2013 on the basis of her apparent inability to return to work on a full-time, full duty basis.

This case belonged in federal court, not state court.

Huff claimed that the Sheriff violated her rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3] USERRA cases against private employers and political subdivisions of states are normally filed and adjudicated in federal district courts. USERRA provides: "In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person

[3] 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.

maintains a place of business."[4] USERRA also provides: "In this section [pertaining to USERRA enforcement], the term 'private employer' includes a political subdivision of a State."[5]

USERRA does not define the term "political subdivision of a State." I found a concise and helpful definition in the *U.S. History Encyclopedia:* "Political subdivisions are local governments created by the states to help fulfill their obligations. Political subdivisions include counties, cities, towns, villages, and special districts such as school districts, water districts, park districts, and airport districts. In the late 1990s, there were almost 90,000 political subdivisions in the United States."

As I explained in Law Review 13156 (November 2013), Huff sued the Sheriff of Roanoke County in the United States District Court for the Western District of Virginia. The Chief Judge of the Western District wrongly dismissed her suit for want of jurisdiction. The case should not have been dismissed. It is clear that Roanoke County is a political subdivision of the Commonwealth of Virginia, and the county maintains a place of business in the Western District of Virginia. As I explained in detail in Law Review 13156, counties and other political subdivisions are not immune from being sued in federal court under the 11th Amendment of the United States Constitution.

In Law Review 13156, I offered to prepare an amicus curiae (friend of the court) brief in support of an appeal to the United States Court of Appeals for the 4th Circuit, the federal appellate court that sits in Richmond and hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.[6] Instead of appealing to the 4th Circuit, Huff chose to refile her case in state court. This Virginia Supreme Court decision is the end of that state court lawsuit.

Huff filed a complaint in the Circuit Court of Roanoke County, asserting four USERRA complaints against the Sheriff. The court granted the Sheriff's motion for summary judgment as to two of the counts. At the conclusion of Huff's presentation of evidence, the court granted the Sheriff's motion to strike with respect to one of the two remaining counts. The court allowed the jury to hear the remaining count, and the jury ruled against Huff and for the Sheriff as to that count. Huff appealed to the Virginia Supreme Court with respect to the two counts as to which the Circuit Court granted summary judgment.

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[4] 38 U.S.C. 4323(c)(2).

[5] 38 U.S.C. 4323(i).

[6] When I was the Director of the Service Members Law Center (SMLC), as a full-time employee of the Reserve Officers Association (ROA), from June 2009 through May 2015, I drafted and filed several amicus briefs in the United States Supreme Court and other courts. I am no longer employed by ROA, and I am no longer in a position to draft and file appellate court briefs for no compensation. If other attorneys can draft such briefs, ROA is willing, when appropriate, to lend its name to such briefs.

USERRA does not give an employee the right to time off from work, even without pay, for medical *treatment,* even if the treatments was necessitated by an injury or illness incurred during active military service.

As I have explained in Law Review 15116 (December 2015) and many other articles, a person has the right to reemployment after a period of voluntary or involuntary uniformed service if he or she meets five simple conditions:

a. Left a civilian job (federal, state, local, or private sector for the purpose of performing "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.[7]
d. Served honorably and was released from the period of service without having received a disqualifying bad discharge from the military.
e. Was timely in reporting back to work or applying for reemployment, after release from the period of uniformed service.[8]

Section 4303 of USERRA defines 16 terms used in this law. The term "service in the uniformed services" is defined 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 employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.[9]

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[7] There are nine exemptions to the five-year limit under section 4312(c), 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a detailed summary of the five-year limit.

[8] After a period of service of fewer than 31 days, the service member is required to report to the civilian employer "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 the safe transportation of the person from the place of that service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i). After a period of service of 31-180 days, the person must apply for reemployment within 14 days. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, the person must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D).

[9] 38 U.S.C. 4303(13) (emphasis supplied).

It is necessary to meet all five of the USERRA conditions to have the right to job-protected absence from a civilian job and to have the right to reinstatement in the job after release from the period of service. USERRA did not give Huff the right to be absent from her civilian job for medical treatment, because she did not meet the first of the five conditions. Her period of absence from her civilian job did not qualify as "service in the uniformed services" as defined by section 4303(13) of USERRA.

Under some circumstances, time off from work for a medical *examination* or other examination to determine a person's fitness for uniformed service is protected by USERRA. This provision most commonly comes into play with respect to a person who has a civilian job and who is trying to enlist in one of the armed forces, either Active Component or Reserve Component. Such a person has the right to be absent from his or her job to travel to the Military Examination and Processing Station (MEPS) for an enlistment physical and other tests necessary to determine whether the military will enlist the person. At the end of the period of examination and the time reasonably required for transportation back to the person's residence and place of employment, the person is entitled to reinstatement, without regard to whether the person was found fit or unfit for service.[10]

Giving employees the right to time off from their civilian jobs for medical *treatment* would require a statutory amendment to USERRA> As I described in Law Review 0965, Representative Lloyd Doggett of Texas introduced H.R. 466, the proposed "Wounded Veteran Job Security Act," in the 111th Congress (2009-10). That bill would have amended USERRA to expand the definition of "service in the uniformed services" to include absence from civilian work for such service-connected medical treatment. Representative Doggett's bill did not pass during the 111th Congress, and so such bill has passed during the 112th Congress, the 113th Congress, or the 114th Congress. The effort continues.

Section 4312(e)(2)(A) does not mean what Huff claimed that it means.

Section 4312(e)(2)(A) 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)

[10] Please see Law Review 16073 (August 2016) and Law Review 13083 (June 2013). The "examination to determine fitness" provision also applies in the case of a service member on the Temporary Disability Retired List (TDRL). Such a service member is required to appear periodically at military treatment facilities to be examined for fitness. If the person has sufficiently recovered from the injury or illness, the person will be ordered back to full active duty. If not, the person will be transferred to the Permanent Disability Retired List. Please see Law Review 0913 (April 2009).

> 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.[11]

Huff claimed that subparagraph (A) gave her the right to a two-year convalescence period and that the Sheriff violated USERRA by firing her in January 2013, within two years after she returned to work in July 2011. As I explained in detail in Law Review 16093 (September 2016), section 4312(e)(2)(A) does not mean what Huff claims that it means, and thus the Virginia Supreme Court ruled correctly in rejecting her claim.

Section 4312(e)(2)(A) means that Huff could have *delayed her application for reemployment* while convalescing, and that her period of convalescence could have extended for up to two years. By applying for reemployment and returning to work in July 2011, shortly after she left active duty, Huff effectively waived the right to delay submitting her application for reemployment.

The good news about this case

The good news about this case is that nothing in the Virginia Supreme Court decision indicates or implies that the Commonwealth of Virginia and its political subdivisions are exempt from the obligation to comply with USERRA or exempt from suit under the "sovereign immunity" doctrine. It is important that the states and their political subdivisions must be required to comply with USERRA because 10% of Reserve Component members have civilian jobs for state government agencies and another 11% work for local governments (political subdivisions).[12]

[11] 38 U.S.C. 4312(e)(2)(A) (emphasis supplied).

[12] Please see the article titled "Too Much To Ask? Supporting Employers in the Operational Reserve Era." The article was written by Dr. Susan Gates, a senior economist in the Rand Institute for Civil Justice. The article can be found at pages 32-40 of the November-December 2013 issue of *The Officer,* ROA's magazine.