

## LAW REVIEW<sup>1</sup> 16105

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### The Posse Comitatus Act and the Activated Reservist

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[About Sam Wright](#)

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**Q: I am a Captain in the Army Reserve (USAR) 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> I have used those articles in managing my own relationship with my civilian employer concerning my**

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<sup>1</sup>I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2000 “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, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<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 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 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, 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 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup>USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (28 U.S.C. §§ 4301-35).

right to take time off from my job for training and service in the USAR, and I have advised other USAR soldiers to use your articles.

I am a police officer on the police force of a major state university. I am currently away from my job for 12 months of USAR active duty. I am doing the active duty in the same metropolitan area where I live and work, so I am living in my own house, with my wife and children, and commuting to my active duty assignment. Based on the advice you gave in Law Review 106 (December 2003),<sup>4</sup> I have resisted the Police Chief's demands that I work nights and weekends at the university police job and that I be available for call by the university police department in case of an emergency. I have refused to work shifts at the university police job based on your 2003 article and also based on advice I received from an active duty Army lawyer. She told me that a law enacted by Congress in the 19<sup>th</sup> Century makes it illegal for active duty soldiers (including USAR soldiers on active duty) to involve themselves in civilian law enforcement. She called this law "Posse Comitatus."

Recently, I got involved in a heated argument with my civilian neighbor about a very loud late-night party at his house—the noise awakened my school age children and made it impossible for them to get back to sleep. I walked to the neighbor's house and demanded that he turn down the music. A heated argument ensued, and the police were called.

A local police officer came and told the neighbor to turn off the music and end the party, and she told me to go home. She also ordered me to stay away from my neighbor's house, and she ordered him to stay away from my house.

When the local police officer arrived at my neighbor's house, my neighbor told her that I was a police officer and that I might be armed. She asked me if I was a police officer. I told her that no, I am a soldier in the United States Army on active duty and that my military duties do not involve law enforcement. I also told her that I was not armed (which was the truth), and I invited her to frisk me.

The chief of the university police department learned of this incident, and he wrote me up on charges, threatening to fire me from my police officer job. He said that it is the department's policy that officers on the force are police officers 24 hours per day and 365 days per year, on university property or off. The police chief contends that I "lied" when I told the local police officer that I was not a police officer.

After a perfunctory investigation by the Internal Affairs Department of the university police force, the police chief formally charged me with "conduct unbecoming a police officer" and scheduled a hearing for next week, while I am still on active duty in the Army. (My 12-month orders do not expire until February 2017.) I am told that it is likely that the hearing will find me guilty and will decide that I should be fired. Help!

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<sup>4</sup>The title of that articles is "Don't Try To Work at your Civilian Job while you Are on Active Duty."

**How was I supposed to answer the local police officer's "are you a police officer" question? It seems to me that military regulations say that I am not a police officer while I am on active duty and that military regulations should control in a case like this, while I am on active duty.**

**A:** First, let me reiterate the advice I gave 13 years ago in Law Review 106. *Do not work at your civilian job (federal, state, local, or private sector) while you are on military duty.*

In the 15 years since the September 11 terrorist attacks, I have heard from several recalled Reserve Component (RC) members who have tried to work part-time at their civilian jobs while on active duty. This practice is particularly common in the Army National Guard, because many Guard members are serving on active duty in the same metropolitan areas where they normally live and work. For several reasons, I think that "moonlighting" in your pre-service job, or in any civilian job, is a bad idea, and I urge you not to try this.

The basic idea behind the Uniformed Services Employment and Reemployment Rights Act (USERRA) is that you leave a job for voluntary or involuntary service, and then you return to that job after you complete the period of service. You only confuse matters when you work part-time at the civilian job during the period of service.

If your active duty assignment is within a reasonable commuting distance of your civilian job, it may be geographically feasible to get to your civilian worksite for a few hours each week, but you must have the permission of your military commander to moonlight in this way. Your commander may give you that permission, but with the clear understanding that your military duties come first. You will not be allowed to say, "I cannot stay late tonight here at the military base, because I need to get to my civilian job."

If you are to work part-time at your civilian job, your civilian employer will probably schedule you for work at certain times. The first time that you are unable to get to work at one of those times, because of conflicting military duties, your civilian employer may try to discipline you or fire you for missing scheduled work. Will USERRA protect you under those circumstances? No.<sup>5</sup> Better to avoid the issue by not trying to work at your civilian job while on active duty.

If you are on full-time active duty, voluntarily or involuntarily, you should be devoting your full time and attention to your military duties. The whole point of USERRA, as well as the Servicemembers Civil Relief Act (SCRA), is to remove civilian legal distractions in order to enable you to do your military duties. Especially if you are called to active duty for a national emergency, you should not be trying to serve your civilian employer simultaneously. "War is a 24-hour job. There will be no novel-writing on the USS Caine." LCDR Queeg (Humphrey Bogart) to LT Keefer (Fred McMurray), in *The Caine Mutiny* (the classic 1954 movie based on the novel by Herman Wouk, a World War II Navy veteran).

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<sup>5</sup> See *Drake v. Tucson, Inc.*, No. CV 09-392 TUC DCB, 2010 WL 148212 (D. Ariz. Jan. 12, 2010).

Second, let me say that my *do not work at your civilian job while you are on active duty* advice applies doubly to federal, state, and local law enforcement officers who are recalled RC members. Let me invite your attention to two specific sections of the United States Code:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or an Act of Congress, willfully uses any part of the Army or Air Force<sup>6</sup> as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>7</sup>

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps<sup>8</sup> in a search, seizure, arrest, or other similar activity unless participation in such activity is otherwise authorized by law.<sup>9</sup>

**Q: How should I have answered the “are you a police officer” question?**

**A:** If I had been there at the time to advise you, I would have suggested that you say: “I am a member of the state university police force, but I am currently on active duty in the Army and I am not exercising police officer functions at this time.” Certainly, the police officer investigating the complaints about the loud party and heated argument did not need a law school dissertation on the Posse Comitatus Act.

In any case, the answer that you gave was truthful. It appears to me that the chief of the state university police force is annoyed with you for exercising your USERRA rights and is trying to create a pretext to justify firing you. Firing you or otherwise disciplining you in these circumstances would violate section 4311 of USERRA.<sup>10</sup>

**Q: By state law, I am entitled to a hearing if the Chief of Police seeks to fire me. I believe that the Chief will not want to wait until I am released from active duty in February 2017 and**

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<sup>6</sup>This section does not mention the Navy or marine Corps, but it is Department of Defense (DOD) policy that Navy and Marine Corps personnel are similarly prohibited from civilian law enforcement activities.

<sup>7</sup>18 U.S.C. § 1385. The citation is to title 18 of the United States Code, section 1385. This section is called the Posse Comitatus Act. It was signed into law by President Rutherford B. Hayes on June 18, 1879. 20 Stat. 152

<sup>8</sup>These rules do not apply to the Coast Guard which is an armed force in the Department of Homeland Security. Maritime law enforcement is one of the principal missions of the Coast guard. These rules also do not apply to members of the Army National Guard and Air National Guard, in its state status, is to enforce the law in circumstances (like civil disturbances) where state and local police need assistance. Please see Law Review 16103 (October 16).

<sup>9</sup>10 U.S.C. § 375. If you work part-time as a federal, state, or local law enforcement officer while you are on full-time military duty, you are at least arguably violating the regulations promulgated under this section.

<sup>10</sup>38 U.S.C. § 4311

**apply for reemployment. The Chief is likely to schedule the firing hearing for early November 2016, while I am still on active duty. The hearing may take several days.**

**Although I am serving on active duty right here in the same metropolitan area where I live and work, I may not be able to take leave from my military assignment to attend and participate in the hearing. Is it lawful for the university police force to schedule the hearing while I am still on active duty?**

**A:** In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA), as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after our country entered World War I. For almost a century, federal law has given service members protection against default judgments in civil court proceedings and has given them the right to continuances when their military duties have precluded them from attending and participating in court proceedings.

When Congress enacted the SCRA in 2003, it expanded this protection to include administrative as well as judicial proceedings at the federal, state, and local levels of government. Congress did this by means of a broad definition of "court" as follows:

The term "court" means a court *or an administrative agency* of the United States or of any State (including a political subdivision of a State), whether or not a court or administrative agency of record.<sup>11</sup>

If your Army commanding officer concludes that your military duties preclude you from attending and participating in the hearing while you are on active duty, he or she should send a letter to that effect to the state university police force chief and/or the president of the state university. The letter should set forth the facts showing that military duty requirements preclude your participation, and the letter should state the date when you will be available to participate. In your case, that can be the date when you are scheduled to leave active duty, in February 2017.

If your commanding officer sends such a letter, the university is required by federal law to grant a continuance of at least 90 days. Here is the entire text of the pertinent SCRA section:

#### § 3932. Stay of proceedings when servicemember has notice

- (a) Applicability of section. This section applies to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section--
  - (1) is in military service or is within 90 days after termination of or release from military service; and
  - (2) has received notice of the action or proceeding.

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<sup>11</sup>50 U.S.C. § 3911(5) (emphasis supplied).

- (b) Stay of proceedings.
  - (1) Authority for stay. At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.
    - (2) Conditions for stay. An application for a stay under paragraph (1) shall include the following:
      - (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
      - (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.
- (c) Application not a waiver of defenses. An application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).
- (d) Additional stay.
  - (1) Application. A servicemember who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material effect of military duty on the servicemember's ability to appear. Such an application may be made by the servicemember at the time of the initial application under subsection (b) or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required under subsection (b) (2) shall be included in an application under this subsection.
  - (2) Appointment of counsel when additional stay refused. If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.
- (e) Coordination with section 201. A servicemember who applies for a stay under this section and is unsuccessful may not seek the protections afforded by section 201 [50 USCS § 3931].
- (f) Inapplicability to section 301. The protections of this section do not apply to section 301 [50 USCS Appx § 531].

Moreover, under your circumstances I would be prepared to argue that the university cannot fire you while you are on active duty because you are not an employee of the university while you are on active duty. While you are on active duty, you are a *former employee with a potential claim to reemployment*.

As I have explained in Law Review 15116 (December 2015) and other articles, you have the right to reemployment after a period of uniformed service if you meet five simple conditions:

1. You left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
2. You gave the employer prior oral or written notice.
3. You have not exceeded the five-year cumulative limit on the duration of the period or periods of service, related to the employer relationship for which you seek reemployment.<sup>12</sup>
4. You were released from the period of service without having received one of the disqualifying bad discharges enumerated in section 4304 of USERRA.<sup>13</sup>
5. After release from the period of service, you made a timely application for reemployment.<sup>14</sup>

If you are released from active duty in February 2017 as scheduled, and if you make a timely application for reemployment and otherwise meet the five USERRA conditions, the employer is required to reemploy you promptly<sup>15</sup> in the position of employment that you would have attained if you had been continuously employed.<sup>16</sup> Upon reemployment, the employer must treat you, for seniority and pension purposes, as if you had been continuously employed in the civilian job during the entire period that you were away from work for service.<sup>17</sup>

It would be unlawful for the university to deny you reemployment based on something that happened during your period of service unless that incident resulted in your having received a disqualifying bad discharge from the military.<sup>18</sup>

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<sup>12</sup>There are nine exemptions to the five-year limit. 38 U.S.C. § 4312(c). that is, there are nine kinds of services that do not count toward exhausting your limit. Please see law Review 16043 (May 2016) for a detailed summary of the five-year limit.

<sup>13</sup>38 U.S.C. § 4303. The disqualifying bad discharges include a bad conduct discharge or dishonorable discharge or dismissal, awarded by court martial as part of the sentence for a guilty verdict on a serious charge. An “other than honorable” administrative discharge also disqualifies the individual from the right of reemployment, as does being “dropped from the rolls” of the uniformed service

<sup>14</sup>After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply for shorter periods of service.

<sup>15</sup>“Absent unusual circumstances, reemployment must occur within two weeks of the employee’s application for reemployment.” 20 C.F.R. 1002.181.

<sup>16</sup>38 U.S.C. § 4313(a)(2)(A).

<sup>17</sup>30 U.S.C. § 4316(a), 4318.

<sup>18</sup>See *Petty v. Metro. Gov’t of Nashville-Davidson Cnty.*, 538 F.3d 431 (6th Cir. 2008). I discuss this case in detail in Law Review 0969.