

LAW REVIEW 16111¹

October 2016

USERRA Applies to Individuals Performing Regular Military Service, as well as those who Serve in the Guard or Reserve

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.3.1.2—USERRA applies to regular military service

I have heard recently from several folks with high positions in military personnel administration who insist that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to persons who are serving or have served as regulars in the Active Component of the armed forces—that USERRA only applies to persons who serve in the National Guard or Reserve. This assertion is wrong and needs to be corrected.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994.³ USERRA was a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. The federal reemployment statute has always applied to persons who leave

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), and other 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.

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. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) 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. 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 at Tully Rinckey PLLC (TR), 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 (May 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

³ Public Law 103-353, 108 Stat. 3161.

civilian jobs for voluntary or involuntary service in the Active Component (AC), as well as the Reserve Component (RC), of the armed forces, and that remains the case today.

I invite the reader's attention to Category 10.1 of the Subject Index of our Law Review Library. You will find a case note on each of the 17 United States Supreme Court cases about the reemployment statute. Fourteen (14) of those cases dealt with individuals who had served in the AC, and only three dealt with RC personnel.

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

- a. Left a civilian job (federal, state, local, or private sector) to perform 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 service, related to the employer relationship for which the person seeks reemployment.⁴
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.⁵
- e. Made a timely application for reemployment with the pre-service employer after release from the period of service.⁶

A person who meets these five conditions is entitled to reemployment in the job that he or she would have attained if continuously employed, or another position (for which the person is qualified) that is of like seniority, status, and pay.⁷ These conditions and entitlements apply equally to those who leave civilian jobs to enlist in the regular military establishment, to those who serve in the National Guard or Reserve and who are called to active duty involuntarily (as in a mobilization), to Guard and Reserve personnel who voluntarily go on active duty, and to Guard and Reserve personnel who are away from their civilian jobs for short military training periods, like drill weekends and annual training periods.

Most persons entering the regular military do not have pre-service civilian jobs, because in the 43 years since Congress abolished the draft in 1973 military recruiters have focused their efforts primarily on high school and college students and persons who have only recently

⁴ Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions—kinds of service that do not count toward exhausting the person's limit.

⁵ Disqualifying bad discharges include bad conduct and dishonorable discharges, awarded by courts martial as part of the sentence for a serious military criminal conviction, and other than honorable administrative discharges. 38 U.S.C. 4304.

⁶ After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁷ 38 U.S.C. 4313(a)(2)(A).

graduated from high school or college. In Law Review 0719 (May 2007), I explained that recruiters can mention USERRA when trying to recruit slightly older persons who are already in the civilian workforce and that expanding the focus of military recruiting was necessary to meet the higher recruiting quotas at the time of the “surge” in Iraq.

A person who chooses to serve full-time in the AC for 20 years or more, to qualify for a regular military retirement, will in most cases be well beyond the five-year limit by the time he or she leaves active duty by retirement. There are exceptions for individuals who get to 20 years of active duty by adding non-continuous periods of service.

For example, Bob Smith served on active duty for 15 or 16 years and then left active duty for whatever reason. After leaving active duty, he found a civilian job at Joe’s Bar & Grill (or any federal, state, local, or private sector employer). Some months or years later, the military gave Bob the opportunity to return to active duty for four or five years to qualify for regular military retirement. Bob can do that and have the right to reemployment at Joe’s Bar & Grill. The 15 or 16 years of active duty that Bob performed previously does not count toward his five-year limit because he performed that active duty before he began his employer relationship with Joe’s Bar & Grill.

Almost one million National Guard and Reserve personnel have been called to the colors since the terrorist attacks of September 11, 2001. The great majority of USERRA cases in the last 15 years pertain to Guard and Reserve personnel, but regulars also have the right to reemployment if they meet the five USERRA conditions.