

LAW REVIEW 16113¹

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Reflections on 40 Years as a Lawyer

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- 1.3.1.3—Timely application for reemployment
- 1.4—USERRA enforcement
- 1.6—USERRA statute of limitations
- 1.8—Relationship between USERRA and other laws/policies
- 4.7—SCRA provision extending statutes of limitations
- 9.0—Miscellaneous

For me, today marks 40 years as an attorney. I just looked at my bar card, which I carry in my wallet. It shows an effective date of 11/1/1976. I have spent most of that 40 years trying to protect the legal rights of service members, especially voting rights and reemployment rights. Let me offer three overarching suggestions, gleaned from 40 years of experience.

a. Prevention is better than cure.

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.

In the immortal words of Benjamin Franklin, “An ounce of prevention is worth a pound of cure.” A continuing frustration for me is to hear from a service member too late. I do not have the power to “turn back the hands of time.”³ Quite often, I hear myself say, “I wish that you had contacted me five years ago.”

As I have explained in Law Review 15116 (December 2015) and other articles, you must meet five conditions to have the right to reemployment after a period of uniformed service. One condition is that you must have made a timely application for reemployment after release from the period of service.⁴ If you fail to apply for reemployment within the deadline, or if you fail to meet one of the other USERRA conditions, you do not have the right to reemployment. The greatest lawyer in the world cannot change this fundamental fact.

b. Don’t sleep on your rights.

Almost all laws have statutes of limitations, and some are very short, even just 30 days for some whistleblower protection laws. If you do not file suit or file a written claim with the designated government agency within the permissible time, you have no enforceable rights. *If you snooze, you lose.*

Uniquely among federal employment laws, the Uniformed Services Employment and Reemployment Rights Act (USERRA) has no statute of limitations, and it expressly precludes the application of other statutes of limitations.⁵ You can file a USERRA complaint years after the fact, but I strongly urge you not to wait. You generally have the burden of proof as the plaintiff, to prove that you meet the eligibility criteria. If you wait, you may lose the ability to prove your case, as memories dim, witnesses die or otherwise become unavailable, and documents are lost or destroyed in the ordinary course of business.

c. Don’t try to represent yourself.

Abraham Lincoln said, “A man who represents himself has a fool for a client.” And the law today is so much more complicated than it was in Lincoln’s lifetime. Under the doctrine of *res judicata*,⁶ you get one and only one chance to prove your case. You must prove your case in the

³ In 1999, singer R. Kelly released his hit “If I Could Turn Back the Hands of Time.”

⁴ 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 after shorter periods of service.

⁵ “If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a federal or state court under this chapter [USERRA] alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.” 38 U.S.C. 4327(b). This provision was added to USERRA on October 8, 2008. It should also be noted that the Servicemembers Civil Relief Act (SCRA) contains a provision that tolls (stops the running of) any statute of limitations on any claim for or against the service member while he or she is on active duty. Please see Law Review 0960 (November 2009).

⁶ Latin for “the thing has been adjudicated.”

trial, and if you fail to accumulate sufficient evidence supporting your case during the discovery process you won't survive the defendant's motion for summary judgment and you will never get to trial. An appeal is an opportunity to get the appellate court to overturn legal errors by the judge, not an opportunity to present new evidence. Every week, I hear from a service member who represented himself or herself in a USERRA case or other case, and almost always the situation is irretrievably hosed up.

Our Law Review Library gives you the opportunity to understand your legal rights, and to understand the steps you need to take to exercise and enforce those rights. Please read and heed before the fact, not after.