

USERRA Rights of Discharged Major Who Has Been Promoted to Lieutenant Colonel and Returned to Active Duty Retroactively by the Board for Correction of Military Records

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

1.3.1.1—Left job for service and gave prior notice

1.8—Relationship between USERRA and other laws/policies

Q: I served on active duty for 16 years and was honorably discharged as a Major after twice being passed over for promotion to Lieutenant Colonel. I left active duty, short of retirement eligibility, on December 1, 2015. I believe that I failed to be promoted to Lieutenant Colonel because I had one very bad Officer Performance Report (OPR) from a Commanding Officer who was angry at me because I “blew the whistle” on him. I contacted the Department of the Army Inspector General to report fraud, waste, and abuse by the CO.

After I left active duty on December 1, 2015, I applied for a Department of the Army (DOA) civilian job and was hired. I started the DOA civilian job on February 1, 2016.

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.

After I was discharged from the Army, I complained to the Department of Defense Inspector General (DODIG) about reprisal for whistleblowing, and I also complained to the Army Board for the Correction of Military Records (ABCMR) that I had been treated unfairly and unlawfully concerning promotion to Lieutenant Colonel and discharge from the Army short of retirement eligibility.

After an investigation, DODIG agreed that the bad OPR was a reprisal for whistleblowing. The ABCMR removed the bad OPR from my personnel record, retroactively promoted me to Lieutenant Colonel, and returned me to active duty retroactively to December 1, 2015. I returned to “real” active duty on November 1, 2016. My 11 months of “limbo” status count toward my eligibility to retire from the Army, and I plan to retire as soon as I am eligible.

As soon as I learned that ABCMR had ruled in my favor and awarded me the relief that I sought, I informed my DOA civilian employer that I would be leaving the civilian job and returning to active duty on November 1, 2016. I also told the DOA civilian personnel office that I plan to leave active duty as soon as I am eligible for retirement and that I am invoking my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The civilian personnel office adamantly contends that I do not have and will not have reemployment rights under USERRA because “you were never really off active duty so you never really held the DOA civilian job.” What do you think?

A: I think that you will have the right to reemployment when you leave active duty if you meet the five USERRA conditions for reemployment. I also think that there is no room for a legal dispute between you and the DOA civilian personnel office now because you do not have a *ripe* claim for reemployment because you do not meet the five conditions and it is not certain that you will meet those conditions.

As I have explained in Law Review 15116 (December 2015) and other articles, you (or any service member) must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.
- b. You must have given the employer prior oral or written notice.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that you have performed, relating to the employer relationship for which you seek reemployment.³

³ Please see Law Review 16043 (May 2016) for a definitive summary of the five-year limit. There are nine exemptions—kinds of service that do not count toward exhausting your five-year limit. Your active duty period that began on November 1, 2016 is not exempt.

- d. You must have served honorably and must have been released from the period of service without having received a disqualifying bad discharge from the military.⁴
- e. After release from the period of service, you must have made a timely application for reemployment.⁵

I believe that you already meet the first two conditions. You held a civilian position of employment and you left that position to report to active duty on November 1, 2016. You gave the civilian employer (DOA) prior notice. I don't buy the "he was never really here because ABCMR restored him to active duty retroactively" theory.

It is not certain that you will meet the other three conditions. You could remain on active duty beyond October 31, 2021, when your five-year limit expires. You could do something stupid ("let's wake up the prisoners and play the naked pyramid game again") and get a disqualifying bad discharge. You could get a great job offer elsewhere and decide not to return to the DOA civilian job. You could win the Publishers Clearinghouse Sweepstakes and retire. God forbid, you could die.

If you leave active duty on or before October 31, 2021 and make a timely application for reemployment, and if you otherwise meet the USERRA conditions, you will have the right to reemployment. When you return from active duty, that will be the time to argue about USERRA. There is no point in arguing about the law now.

⁴ Under section 4304 of USERRA, 38 U.S.C. 4304, disqualifying bad discharges include punitive discharges (by court martial) and other-than-honorable administrative discharges.

⁵ 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.