

It Is Unlawful for an Employer To Delay Reemployment by Demanding Documentation that Is Not Readily Available.

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

Update on Sam Wright

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Q: I am a Commander in the Navy Reserve (recently retired) 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).

I was born in 1970 and graduated from high school in 1988. Days later, I reported to the United States Naval Academy for “plebe summer.” In 1992, I graduated and was commissioned an Ensign. I served on active duty for 13 years as a naval aviator and left active duty in 2005.

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1500 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, 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 (June 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 left active duty, I affiliated with the Navy Reserve. On the civilian side, I took a job as a pilot for a major airline—let's call it Braniff Air Lines or BAL. I worked for the airline for four years, until I returned to active duty in October 2009. I notified BAL orally and in writing that I was leaving the job to report to active duty.

I volunteered to return to active duty in 2009, but my service was clearly for the national emergency, and the “magic words” exempting my service from USERRA’s five-year limit should have been but were not included in the orders, due to an administrative oversight at the Personnel Support Detachment (PSD). The four years from October 2009 to September 2013 clearly were exempt from the computation of my five-year limit under USERRA, under the rules you discussed in Law Review 16043 (May 2016) and Law Review 16075 (August 2016).

My final three years of active duty, from October 2013 to September 2016, clearly do count toward the five-year limit, but I have not exceeded the five-year limit with respect to my employer relationship with BAL. It is my understanding that my 17 years of active duty (including four years as a Midshipman at the Naval Academy) from 1988 to 2005 do not count toward the five-year limit because I performed that active duty before I was hired by BAL in 2005. During the four years that I worked for BAL (2005-09), the only times that I missed BAL work for military duty were for drill weekends and two-week annual training tours. It is my understanding that those short periods of military training do not count toward exhausting my five-year limit with BAL.

My final three years of active duty (October 2013 to September 2016) count toward the five-year limit, but the four years between October 2009 and September 2013 are exempt. I have used only three years of my five-year limit, and I am entitled to reemployment at BAL, right?

By July 2016, I had attained 20 years of active duty and had qualified for a regular military retirement. I am entitled to 13 years and two months of active duty retirement credit for the time between May 1992 (when I was commissioned an Ensign) and July 2005, when I left active duty. I am also entitled to regular retirement credit for the seven years of active duty that I performed from October 2009 through September 2016. On September 30, 2016, I retired from the Navy and left active duty.

I am now receiving a monthly retirement check from the Navy, but I am only 46 years old and I am not ready to retire, either financially or psychologically. Therefore, I applied for reemployment at BAL on October 4, just four days after I left active duty. The company asked me for documentation that I was within the five-year limit, and I provided a copy of my DD-214. On that copy, I highlighted the statement to the effect that my active duty from October 2009 to September 2013 was exempt from the limit.

I returned to work for the airline on Monday, October 10, to attend a required training course for pilots. Just five days later, the company's personnel office told me that the DD-214 was not sufficient documentation that my 2009-13 active duty period was exempt. The company said that only the military orders themselves can exempt a period of voluntary active duty from the five-year limit.

I contacted the Officer-in-Charge (OIC) of the PSD and requested him to provide me with amended orders for the 2009-13 period and that the amended orders should contain the "magic words" exempting that period from my five-year limit at BAL. The OIC told me that it is "impossible" to get amended orders for a period of service that ended in September 2013 and that the statement in the DD-214 is sufficient to document that I have not exceeded the five-year limit.

I then contacted the BAL personnel office and passed along what the OIC had said. The personnel office continues to insist that I have not adequately documented that I am within the five-year limit. The company suspended me from the training class and put me on an unpaid "personal leave of absence" until I provide documentation that the company agrees is sufficient.

Despite my diligent efforts, I am unable to provide any further documentation, beyond what I have provided, but the company adamantly refuses to reinstate me to the payroll. Have my USERRA rights been violated?

A: Yes. You met the USERRA conditions for reemployment in October 2016 and the documentation that you have provided (the DD-214) is sufficient. Moreover, USERRA makes it unlawful for an employer to delay or deny reemployment by demanding documentation that does not exist or is not readily available.

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

- a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service. You did this in October 2009.
- b. Must have given the employer prior oral or written notice. You showed me a copy of the certified letter that you sent to BAL's Chief Pilot in August 2009, when you learned that you would be going on active duty.
- c. Must not have exceeded the five-year limit, as discussed below.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military. The fact that you are now retired clearly shows that you did not receive a bad discharge.

- e. Must have made a timely application for reemployment, after release from the period of service.³

I agree with your analysis that only your last three years of active duty (2013-16) count toward your five-year limit at BAL. You met the five USERRA conditions, including the five-year limit. You are entitled to reemployment at BAL.

USERRA provides as follows concerning the employer's right to demand that the returning service member provide documentation when applying for reemployment:

- (f) (1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that--
 - (A) the person's application is timely;
 - (B) *the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and*
 - (C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.
 - *(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary [of Labor] shall satisfy the documentation requirements in such paragraph.*
 - *(3) (A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.*
 - (B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

³ After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. You applied for reemployment just five days into your 90-day deadline.

- **(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.**⁴

Section 4331 of USERRA⁵ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* in December 2005. The regulations are codified in title 20 of the Code of Federal Regulations (C.F.R.) at part 1002 (20 C.F.R. Part 1002). Three sections pertain to the documentation requirement, as follows:

§ 1002.121 Is the employee required to submit documentation to the employer in connection with the application for reemployment?

- Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee *submits an application for reemployment after a period of service of more than 30 days*,⁶ he or she must, upon the request of the employer, provide documentation to establish that:
 - **(a)**§ 1002.121(a) The reemployment application is timely;
 - **(b)**§ 1002.121(b) *The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,*
 - **(c)**§ 1002.121(c) The employee's separation or dismissal from service was not disqualifying.

§ 1002.122 Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?

- Yes. § 1002.122 Yes. *The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation.* If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing

⁴ 38 U.S.C. 4312(f) (emphasis supplied).

⁵ 38 U.S.C. 4331.

⁶ After a period of service of less than 31 days (like a drill weekend or a traditional two-week annual training tour), the service member *reports for work* rather than applying for reemployment. There is no documentation requirement after these short tours.

⁷ 20 C.F.R. 1002.121 (bold question in original, emphasis by italics supplied).

entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.⁸

§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

- **(a)**§ 1002.123(a) Documents that satisfy the requirements of USERRA include the following:
 - (1) *DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty*⁹;
 - (2)§ 1002.123(a)(2) Copy of duty orders prepared by the endorsement indicating completion of the described service;
 - (3)§ 1002.123(a)(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
 - (4)§ 1002.123(a)(4) Certificate of completion from military training school;
 - (5)§ 1002.123(a)(5) Discharge certificate showing character of service; and,
 - (6)§ 1002.123(a)(6) Copy of extracts from payroll documents showing periods of service;
 - (7)§ 1002.123(a)(7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.
- **(b)**§ 1002.123(b) *The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.*¹⁰

The statement in your DD-214, to the effect that your 2009-13 active duty period is exempt from the five-year limit, is sufficient documentation showing that you have not exceeded the five-year limit. Moreover, the DD-214 is the only documentation that is readily available now. By denying your application for reemployment based on your failure to provide something that does not exist, BAL has egregiously violated USERRA.

⁸ 20 C.F.R. 1002.122 (bold question in original, emphasis by italics supplied).

⁹ The DD-214 is the most common form of documentation that the returning service member provides to the civilian employer. The DOL regulation clearly shows that the DD-214 is an acceptable form of documentation.

¹⁰ 20 C.F.R. 1002.123 (bold question in original, emphasis by italics supplied).