LAW REVIEW 17010[1]
February 2017

USERRA Entitles You to Return to a Position of like Status

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

Update on Sam Wright

1.3.2.4—Status of the returning veteran
1.4—USERRA enforcement

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), including your Law Review 15116 (December 2015), your "primer" on this law.

Early last year (2016), I was involuntarily called to active duty along with my USAR unit and deployed overseas for one year, from January 2016 to January 2017. Using your Law Review 15116 as a guide, I have very carefully documented that I meet each of the five USERRA conditions for reemployment. I left my civilian job at Daddy Warbucks Industries (DWI) to perform uniformed service, and I gave the employer both oral and written notice. Because I was called to active duty involuntarily, my 2016-17 active duty period does not count toward my five-year limit at DWI, but even if it counts I am not close to exceeding the five-year limit. I served honorably and was released from active duty without a disqualifying bad discharge

---

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1600 "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 1400 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 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 more than 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, 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.

from the Army. After I was released from active duty, I applied for reemployment at DWI the next day, well within the 90-day deadline to apply for reemployment.

DWI is a major company with scores of offices and facilities all over the country. I was the manager of a facility in California, in the Los Angeles metropolitan area, when I was called to active duty in early 2016. In September 2015, when I learned that I was being called to active duty and gave notice to DWI, I recommended that Assistant Manager Mary Jones be put in charge of the facility on an acting basis during my deployment, and the company implemented that suggestion. As I could have predicted, Mary did a fine job, and in September 2016 (while I was still on active duty in Southwest Asia) DWI made her the "permanent" manager of the facility.

When I applied for reemployment in January 2017, the company's personnel department told me that it is "impossible" to reinstate me as the manager of the facility in the Los Angeles area because that job now belongs to Mary Jones. The company offered me two choices. I could be the assistant manager of the California facility (the job formerly held by Mary Jones), or I could be the manager of a similar facility on the east coast, replacing a facility manager who was recently terminated for poor performance.

I cannot pick up and move across the country, because my wife has a good job in the Los Angeles area and because her elderly father and my elderly mother are here in Los Angeles. Accordingly, I took the offer of being the assistant manager of the facility I previously managed. The company is paying me the same salary that I previously earned as the facility manager, but I have a problem working for the person (Mary Jones) who previously worked for me. Have my USERRA rights been violated?

Answer-Bottom Line Up Front: Yes, your USERRA rights have been violated. Because you met the five USERRA conditions, you are entitled to be reemployed in the position that you would have attained if you had been continuously employed by DWI during the time that you were away from work for uniformed service, or in another position for which you are qualified that is of like seniority, *status,* and pay. Neither the assistant manager position in California nor the manager position on the east coast are of like status to the manager position that you left and would have continued to hold but for your call to the colors.

Explanation: Because you met the five conditions, you are entitled to be reemployed as follows:

> In the position of employment in which the person [you] would have been employed if the continuous employment of such person with the employer had not been

> interrupted by such service, or a position of like seniority, *status,* and pay, the duties of which the person is qualified to perform.[3]

As I explained in Law Review 15067 (August 2015), USERRA was enacted in 1994 as a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. USERRA made some major changes, but the concept of "status" has not changed from the VRR law to USERRA.

The VRR law did not give rulemaking authority to the Department of Labor (DOL), but DOL did publish a *VRR Handbook*. While employed as a DOL attorney, I co-edited the 1988 edition of that handbook, which replaced the 1970 edition. Several courts, including the Supreme Court, have accorded a "measure of weight" to the interpretations expressed in the *VRR Handbook*.[4]

The 1988 *VRR Handbook* has this to say about the concept of status:

> The statutory concept of 'status' is broad enough to include both pay and seniority, as well as other attributes of the position, such as working conditions, opportunities for advancement, job location, shift assignment, rank or responsibility, etc. Where such matters are not controlled by seniority or where no established seniority system exists, they can be viewed as matters of 'status.' In a determination of whether an alternative position offered is of 'like seniority, status, and pay,' all of the features that make up its 'status' must be considered in addition to the seniority and rate of pay that are involved."

USERRA's legislative history also addresses the issue of "status," as follows:

> Although not the subject of frequent court decisions, courts have construed status to include 'opportunities for advancement, general working conditions, job location, shift assignment, [and] rank and responsibility.' (*Monday v. Adams Packing Association*, *Inc.,* 85 LRRM 2341, 2343 (M.D. Fla. 1973).) *See Hackett v. State of Minnesota*, 120 Labor Cases (CCH) Par. 11,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of status. (*See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921,

[3] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied). For purposes of this article, I assume that if you had not been called to active duty you would have remained as the Manager of the DWI facility in the Los Angeles area.

[4] *See Monroe v. Standard Oil Co*., 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992); *Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers and Distributors Association*, 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Helton v*. *Mercury Freight Lines, Inc*., 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

> 2923 (M.D. Tenn. 1972)), as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation."[5]

The insufficiency of the assistant manager position, with respect to status, is clearly illustrated by the case of *Ryan v. Rush-Presbyterian-St. Luke's Medical Center.*[6] The plaintiff, Margaret A. Ryan, was a Nurse Corps officer in the Navy Reserve when she was called to active duty for Operation Desert Storm in 1991. On the civilian side, she was the nurse manager of a medical facility in Indiana. When she returned from active duty, the employer offered her the position of assistant nurse manager, with the same salary. Ryan refused to take the position of lesser status, and she sued the employer. The District Court granted the employer's motion for summary judgment, apparently based on "no harm no foul." Ryan appealed to the United States Court of Appeals for the 7th Circuit[7] and prevailed. The appellate court reversed the district court because the assistant nurse manager position was not equal in status to the manager position that Ryan held before she was called to the colors and almost certainly would have continued to hold but for her call to duty.

The fact that the California manager position has been filled and that the incumbent is doing a fine job in no way detracts from your right to reemployment in that position. The United States Court of Appeals for the Federal Circuit[8] has held:

> The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 285 (1946).' *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position

---

[5] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 676 of the 2016 edition of the *Manual.*

[6] 15 F.3d 697 (7th Cir. 1994).

[7] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[8] The Federal Circuit is the federal appellate court that sits in Washington, DC and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB).

> is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[9]

Concerning the insufficiency of the east coast facility manager position that you were offered, I invite your attention to *Armstrong v. Cleaner Services.*[10] The plaintiff (Ronald D. Armstrong) was hired in November 1967 as the manager of one of the defendant's three One Hour Martinizing (dry cleaning) plants in Murfreesboro, Tennessee (Armstrong's home town). Armstrong worked in that manager position until March 1968, when he was drafted. He was honorably discharged in March 1970 and promptly applied for reemployment. The defendant was unwilling to reinstate Armstrong as manager of the facility where he had been employed because the manager position at that facility was filled. The defendant offered Armstrong a similar position at Fort Oglethorpe, Georgia. Armstrong declined that offer and sued.

The case was assigned to Judge Leland Clure Morton of the United States District Court for the Middle District of Tennessee.[11] In his scholarly opinion, Judge Morton wrote:

> Under the facts of this particular case, plaintiff was entitled to be reinstated in his pre-induction position at one of defendant's three plants in Murfreesboro. To hold that plaintiff had no such rights under the Act would have the effect of penalizing plaintiff for serving his country in the Armed Services. In addition to the circumstance that plaintiff's wife was five to six months pregnant, the court must consider the financial burden which would necessarily be required of a removal to Georgia. No evidence was introduced to indicate that defendant would have paid any expenses resulting from such a move.
>
> The fact that it had been the custom and policy of the defendant to shift managers from plant to plant does not justify the defendant's refusal to re-employ the plaintiff at the same place of employment. *See Salter v. Becker Roofing Co*., 65 F. Supp. 633 (M.D. Ala. 1946); *Mihelich v. F. W. Woolworth Co*., 69 F. Supp. 497 (D. Idaho 1946)). Nor does the mere fact that defendant has hired another to fill the vacated position make it unreasonable to require an employer to reinstate a veteran in that position. *Trusteed*

---

[9] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993). Nichols was the supervisory chaplain (GS-13) at a VA medical facility when he left the job for military service. When he returned from service, he was reinstated as a GS-13 chaplain at the same facility, but the VA refused to make him the supervisor of the other chaplains at the facility. The MSPB agreed with the VA, but the Federal Circuit reversed, holding that being the supervisor of other chaplains was part of the status to which Nichols was entitled.

[10] 1972 U.S. Dist. LEXIS 15054 (M.D. Tenn. February 17, 1972). This case is cited in USERRA's legislative history, quoted above.

[11] Judge Morton was appointed to the court by President Richard M. Nixon and confirmed by the Senate in 1970. He took senior status in 1984 and died in 1998.

Funds v. Dacey, 160 F.2d 413, 420 (1st Cir. 1947); *Salter v. Becker Roofing Co., supra*, at 636.[12]

USERRA's remedies section, pertaining to cases against private employers and state and local governments, provides: "The court may require [order] the employer to comply with the provisions of this chapter [USERRA]."[13] If you sue DWI in federal district court, you will very likely prevail, and the court will order the employer to put you in the manager position, although that means displacing Mary Jones. If you retain private counsel to represent you in such a case, the court may award you attorney fees.[14]

[12] *Armstrong, supra,* at pages 5-6.
[13] 38 U.S.C. 4323(d)(1)(A).
[14] 38 U.S.C. 4323(h)(2).