

LAW REVIEW¹ 17022
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USERRA and the Tax Bump

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

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

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Q: I am a Lieutenant Colonel in the Army Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 13105 (August 2013), because that article seems to pertain directly to my situation.

I went to work for a major corporation (let’s call it Daddy Warbucks Industries or DWI) in 2009. While I worked for DWI, I continually got a hard time from my DWI supervisor and his supervisor about the DWI work days that I missed because of my Army Reserve training and

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “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), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 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. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

about the possibility that I might be mobilized and deployed. On many occasions, my supervisor said: “You must make a choice. You can work for DWI or you can play soldier. You cannot do both.”

In June 2011, I learned that it was quite likely that I would be mobilized, with my Army Reserve unit, in October 2011. As you have suggested in several of your “Law Review” articles, I shared that information immediately with my DWI supervisor and the DWI personnel office. The supervisor reacted quite negatively to this news.

Just three weeks after I notified DWI of my likely mobilization, the company fired me with no explanation other than “you are not meeting our expectations.” I protested that the firing was motivated by my Army Reserve service and my impending mobilization and that the firing violated USERRA. The company’s lawyer denied that the firing had anything to do with my military service but refused to explain the reason for the firing. She said that I was an “employee at will” and that the company did not need a reason to fire me. She said that the firing was not legally reviewable.

I reported to active duty as ordered on October 1, 2011. I served for exactly one year and was released from active duty on September 30, 2012. As you have suggested, I made an immediate application for reemployment after I left active duty, but the company refused to consider me, saying that I had been fired for misconduct and that the company would not rehire me under any circumstances.

I filed a written USERRA complaint with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency’s investigator did a haphazard investigation and seemed to accept at face value all the legal and factual assertions of DWI’s attorney. DOL-VETS closed my case as “without merit” but I was convinced that it did have merit.³ I had difficulty finding an attorney to take my case, because most attorneys did not want to look behind the DOL-VETS “no merit” determination, but I eventually found an excellent attorney.

The case has dragged on with very contentious discovery and many discovery disputes that the judge was required to adjudicate. The case is set for trial in October 2017, five years after I returned from my year of active duty and applied for reemployment. My attorney tells me

³In December 2016, ROA’s Executive Director (Major General Jeffrey Phillips, USA (Ret.)) met with the Honorable Mike Michaud, the Assistant Secretary of Labor for Veterans’ Employment and Training and head of DOL-VETS, to discuss the need for DOL-VETS to improve the quality of USERRA investigations. I believe that there has been some improvement, but much more needs to be done. Assistant Secretary Michaud was an appointee of President Obama, and he left office on January 20, 2017. When a new Assistant Secretary is appointed and confirmed by the Senate, ROA will meet with him or her to renew the suggestions for improvement of DOL-VETS.

that we have a strong case and based on the attorney's advice I have rejected the employer's offer of \$75,000 to settle the case.⁴

I was making \$60,000 per year at DWI. I was fired on July 1, 2011, three months before I would have left anyway to report to active duty. Thus, I lost \$15,000 in DWI pay in 2011. After DWI denied me reemployment in October 2012, when I returned from my year of active duty, I started immediately looking diligently for other work. DWI has made it very difficult for me to find other work, because the company has "bad-mouthing" me to prospective employers, saying that I was an unsatisfactory employee and that I was fired for misconduct.

If I had been reemployed by DWI in October 2012, and if I had remained employed by the company through October 2017, I would have earned \$300,000 from the company.⁵ Over that five-year period, I have earned only \$100,000 from the jobs that I have found.

During calendar year 2017, I will likely receive about \$200,000 in back pay. Receiving all that money in just one year will put me in a much higher tax bracket for 2017. That means that I must pay a lot more in federal income tax than what I would have paid if I had received the money each pay period over the five-year period, as I should have received it. It is not fair.

In Law Review 13105, you wrote about the proposed "Civil Justice Tax Fairness Act of 2013."⁶ You wrote that if the bill were enacted plaintiffs under USERRA and other employment discrimination laws would be permitted to spread out substantial back pay awards over several years to avoid the "tax bump" problem.

Was the proposed Civil Justice Tax Fairness Act of 2013 enacted? Is there a solution to my "tax bump" problem?

Answer, Bottom Line Up Front:

The proposed Civil Justice Tax Fairness Act of 2013 was not enacted during the 113th Congress (2013-14), and no such legislation was enacted during the 114th Congress (2015-16). The effort

⁴Please see Law Review 206 (December 2005) for a detailed discussion of the computation of damages in USERRA cases. In USERRA cases and employment cases generally, the plaintiff has a duty to mitigate damages by searching for other work. If you win in your case, you are entitled to back pay, based on what you would have earned from the lawbreaking employer minus what you did earn from your mitigating employment. The computation should be done on a pay-period-by-pay period basis. If you make more money from the mitigating employment in a pay period, you receive no back pay for that pay period, but the difference is not applied to earlier or later pay periods. Also, the computation should be for *comparable hours*. If you work overtime in the mitigating employment, the lawbreaking employer should not benefit from your extra effort.

⁵Other DWI employees have likely received pay raises during the last six years. In computing your back-pay award, we need to look to what you *would have earned* in each pay period, not what you were earning in 2011, before you were fired. You may be entitled to substantially more than \$300,000 in back pay.

⁶During the 113th Congress (2013-14), Representative John Lewis of Georgia introduced H.R. 2509 in the House of Representatives, and Senator Ben Cardin of Maryland introduced an identical bill (S. 1224) in the Senate.

continues during the 115th Congress (2017-18). There is another possible solution to your tax bump problem.

Solution:

USERRA provides:

The court [the Federal District Court hearing a USERRA case against a private employer or a state or local government] shall use, in any case in which the court determines that it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.⁷

If you prevail in your lawsuit against DWI, the court will “require the employer [DWI] to compensate the person for any loss of wages or benefits suffered by reason of such employer’s failure to comply with the provisions of this chapter.”⁸ The court (meaning the jury, if you request a jury trial) will compute what you would have earned from DWI, on a pay period by pay period basis, but for the unlawful firing, and then will subtract from that figure what you earned from the mitigating employment that you found. The court will award you a judgment for that amount of back pay.

Then, you ask the judge to use his or her equity powers, under section 4323(e) of USERRA, to award you an upward adjustment of that amount to make you whole for the extra income tax that you must pay because you are receiving the salary for five years (2012-17) all in one year (2017). In a very recent case, Judge Pamela Popper of the United States District Court for the Eastern District of Wisconsin awarded an equitable adjustment in exactly this situation. In her scholarly opinion, Judge Popper wrote:

The plaintiff also asks the court to compensate him for the additional tax liability he will face as a result of the back-pay award. Docket Number 126 at 14. The defendant argues that courts should reserve the remedy of tax offsets for extreme circumstances, and that the plaintiff's circumstance is not so extreme. Docket Number 132 at 11.

Equal Employment Opportunity Commission v. Northern Star Hospitality, Inc., 777 F.3d 898, 904 (7th Cir. 2015), the Seventh Circuit joined "the Third and Tenth Circuits in affirming a tax-component award in the Title VII context." Specifically, the Seventh Circuit affirmed the district court's award of \$6,495.00 to offset the plaintiff's tax liability on a \$43,300.50 back-pay award for a Title VII retaliation claim. *Northern Star Hospitality*, 777 F.3d at 901. The back-pay award placed the plaintiff in a higher tax bracket than if he had received the pay on a regular, scheduled basis. *Id.* at 903-04. Without the tax offset, the plaintiff would not have been made whole, and the court

⁷38 U.S.C. § 4323(e).

⁸*Id.* § 4323(d)(1)(B).

found that that result "offends Title VII's remedial scheme." *Id.* Although *Northern Star* was a Title VII case, USERRA's remedial scheme also aims to make the plaintiff whole. See 38 U.S.C. 4323(d)(1)(B). ("The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.").

The back-pay award here will push the plaintiff's tax bracket from 15% to 28%. Docket Number 126 at 14. He calculates that this bump will result in an additional \$5,440.76 tax liability. *Id.* at 15. The court does not agree that a plaintiff should receive a tax offset only in extreme circumstances. *Northern Star* set a clear standard. *Northern Star Hospitality*, 777 F.3d at 903-04. A tax offset is necessary to make the plaintiff whole. *Id.* The court will add \$5,440.76 to the plaintiff's award to accomplish that goal.⁹

I hope that this information is useful to you and your attorney. Please keep me informed of the outcome of your case.

Update – April 2022¹⁰

As of April 2022. The Civil Justice Tax Fairness Act of 2013 has not been enacted. Therefore, servicemembers will need to still rely on USERRA to avoid the tax bump.

Please join or support ROA

This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their

⁹Wescher v. Chem-Tech Int'l, Case No. 13-CV-229-PP, 2016 WL 7441655 (Dec. 27, 2016).

¹⁰Update by Second Lieutenant Lauren Walker, USMC.

dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight¹¹ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE

¹¹Congress recently established the United States Space Force as the 8th uniformed service.