

LAW REVIEW 17035¹

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USERRA Rights of Airline Pilot Injured while on Active Duty

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Update on Sam Wright

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Q: I am the Chief Pilot of a major airline. We have a junior pilot who is a Captain in the Air Force Reserve (USAFR). Let's call her Josephine Smith. We have issues with her about her absences from work for USAFR training and service. She referred me to your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Josephine joined our airline in March 2014, after she left active duty in the Air Force. In March 2016, she was recalled to active duty. She served on active duty for one year and returned home in late March 2017. She applied for reemployment almost immediately after she was released from active duty.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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. 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 through ROA at (800) 809-9448, extension 730, or SWright@roa.org. Please understand that I am a volunteer, and I may not be able to respond the same day.

While on active duty, Josephine suffered a serious shoulder injury, and she had surgery and is still recovering. Currently, her medical condition precludes her from having a commercial pilot's license from the Federal Aviation Administration (FAA). It is unclear how long it will take for her to recover and regain her pilot's license. I told her that we (the airline) don't want to see her back until she has recovered and has regained her license.

Josephine told me that USERRA requires the airline to reemploy her promptly in a non-flying position during her recuperation. Is that correct?

Answer, bottom line up front:

Yes. If Josephine meets the five USERRA conditions for reemployment, the airline is required to reemploy her promptly³ in the position of employment that she would have attained if she had been continuously employed, or in another position for which she is qualified that is of like seniority, status, and pay.⁴ Because she has a disability that she incurred during her period of service, the airline is required to make reasonable efforts to accommodate the disability in the position that she would have attained if she had been continuously employed.⁵ If her disability cannot be reasonably accommodated in that position (i.e., in the cockpit of an airliner), the airline must reemploy her in some other position for which she is qualified, *or for which she can become qualified with reasonable employer efforts*, that is of like seniority, status, and pay, or as close as possible in her circumstances.⁶

EXPLANATION

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA⁷ in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).⁸ The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II.

³ The airline must reemploy her within two weeks after receiving her application for reemployment. 20 C.F.R. 1002.181.

⁴ 38 U.S.C. 4313(a)(2)(A).

⁵ The position that she would have attained is almost certainly the position that she left, in this circumstance.

⁶ 38 U.S.C. 4313(a)(3).

⁷ Public Law 103-353, 108 Stat. 3162. The citation means that USERRA was the 353rd Public Law enacted during the 103rd Congress (1993-94), and you can find this law, in the form that it was enacted in 1994, in Volume 108 of *Statutes at Large*, starting on page 3162. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). USERRA has been amended several times since it was enacted in 1994. As I shall explain further below, a 1998 amendment is especially pertinent to your case.

⁸ Public Law 76-783, 54 Stat. 885.

During the congressional debates on the STSA, Senator Elbert Thomas of Utah conceived of the idea of requiring civilian employers to reemploy those who were called to the colors, and he offered an amendment to require such reemployment. He explained the rationale for his amendment as follows:

It is not unreasonable to require the employers of such men [those who will be drafted under the law we are considering today] to rehire them upon the completion of their service, since the lives and property of employers, as well as the lives and property of everyone else in this country, are defended by such service.⁹

Senator Thomas' eloquent argument persuaded his colleagues in the Senate, and later in the House, and the original VRRA was included in the STSA as it was signed into law by President Franklin D. Roosevelt in 1940. As originally enacted, the VRRA only applied to draftees, but just one year later, as part of the Service Extension Act of 1941,¹⁰ Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees.

The federal reemployment statute has been on the books for 77 years and is part of the fabric of our society. There have been 16 Supreme Court decisions under the VRRA and one (so far) under USERRA.¹¹ In its first VRRA case, the Supreme Court established the principle of liberal construction of this vital law. In the majority opinion, written by Justice William O. Douglas, the Court held: "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."¹² Justice Douglas' eloquent words about the members of my father's generation (the so-called "Greatest Generation") who fought World War II apply equally to their children, grandchildren, and great-grandchildren who are fighting the Global War on Terrorism today, in the aftermath of the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time.

USERRA's eligibility criteria

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

⁹ 96 Cong. Rec. 10573. Senator Thomas' eloquent statement is quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8th Cir. 1991).

¹⁰ Public Law 77-213, 55 Stat. 626, 627.

¹¹ Please see Category 10.1 in our Law Review Subject Index. You will find a case note about each of these 17 Supreme Court decisions.

¹² *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

- a. She must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services. It is clear beyond question that she did this in 2016.
- b. She must have given the employer prior oral or written notice. You have showed me a copy of the letter that she sent to the personnel office in 2016, before she left her job to report to active duty.
- c. She must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which she sought reemployment.¹³
- d. She must have been released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA.¹⁴ Josephine served honorably and did not receive a disqualifying discharge—indeed, she has not been discharged and is still serving in the Air Force Reserve.
- e. After release from the period of service, she must have made a timely application for reemployment.¹⁵ You have stated that Josephine applied for reemployment almost immediately after she left active duty in March 2017.

It is clear beyond question that Josephine met the conditions and was entitled to reemployment when she applied last month.

USERRA's provisions for disabled veterans

USERRA provides as follows about the rights of the returning service member or veteran who meets the five USERRA conditions and who returns with a temporary or permanent disability incurred during the period of service:

- o (3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service--
 - (A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

¹³ Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. Josephine's 2016-17 active duty period did not count toward her five-year limit with the airline because she was recalled to active duty involuntarily. See 38 U.S.C. 4312(c)(4)(A).

¹⁴ 38 U.S.C. 4304. The enumerated disqualifying discharges include a dishonorable discharge, a bad conduct discharge, a dismissal, an administrative discharge characterized as "other than honorable," or being "dropped from the rolls" of a uniformed service.

¹⁵ After release from 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.

- **(B)** if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.¹⁶

Section 4331 of USERRA¹⁷ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of this law to state and local governments and private employers. DOL published proposed USERRA regulations in the *Federal Register*, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The final regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), part 1002. The pertinent section is as follows:

1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

- Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her to become qualified to perform the duties of one of these positions:
 - (a) A position that is equivalent in seniority, status, and pay to the escalator position; or,
 - (b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. *A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.*¹⁸

Josephine Smith's disability precludes her from returning to the cockpit of an airliner, at least for now. I concede that there is no accommodation that the airline can make that would make it possible for her to serve as the First Officer on an airline flight. Under section 4313(a)(3) of USERRA and section 1002.225 of the DOL USERRA Regulations, the airline has a duty to reemploy Josephine in another position at the airline for which she is qualified, or can become

¹⁶ 38 U.S.C. 4313(a)(3).

¹⁷ 38 U.S.C. 4331.

¹⁸ 20 C.F.R. 1002.225 (bold question in original, emphasis by italics supplied).

qualified with reasonable employer efforts, and that is the closest approximation to the First Officer position to which she would be entitled but for the disability.¹⁹

Q: But Josephine was not wounded in combat, and she did not deploy overseas. She performed the year of active duty at an Air Force base near her home.

A: That does not matter. Section 4313(a)(3) applies to any person who meets the five USERRA conditions and “who has a disability incurred in, or aggravated during, such service.”²⁰ Josephine incurred the disability during the time that she was on active duty, and that is all that is required for section 4313(a)(3) to apply.

Q: We have studied all our positions at the airline, and we can find only one position that Josephine Smith is qualified for, without the FAA license that is required for flying positions. That position is in the safety department, and the position is currently held by Bob Jones, who is doing a fine job. Does USERRA require us to displace Bob Jones to accommodate Josephine Smith?

A: Yes. The fact that there is no present vacancy for which she is qualified, that is of like seniority, status, and pay, is not a defense to the employer’s unqualified obligation to reemploy Josephine Smith promptly in an appropriate position. The company is required to displace an incumbent employee, if that is what is required to reemploy her in an appropriate position.

The United States Court of Appeals for the Federal Circuit²¹ 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

¹⁹ For further discussion of the USERRA rights of returning disabled veterans, please see Law Review 0640 (December 2006) and Law Review 0854 (November 2008).

²⁰ 38 U.S.C. 4313(a)(3).

²¹ 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.²²

USERRA's legislative history includes the following instructive paragraph:

It is also not a sufficient excuse [for the employer not to reemploy the returning veteran in an appropriate position] that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application [for reemployment]. *Davis v. Halifax County School System*, 508 F. Supp. 966, 969 (E.D.N.C. 1981). *See also Fitz v. Board of Education of Port Huron*, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *affirmed*, 802 F.2d 457 (6th Cir. 1986); *Anthony v. Basic American Foods*, 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 709 (8th Cir. 1983).²³

Q: But Bob Jones has a contractual right to the job, under our collective bargaining agreement (CBA) with the union. Furloughing Bob Jones would violate the CBA.

A: In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers, *or agreements between employers and unions*, can cut down the service adjustment benefits that Congress has secured the veteran under the Act."²⁴

USERRA is a floor and not a ceiling on the rights of those who are serving or have served our country in uniform. The CBA can give service members and veterans greater or additional rights, but it cannot take away the rights that Congress has granted, under USERRA. The law provides:

- **(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the

²² *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.

²³ 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 667 of the 2016 edition of the *Manual*.

²⁴ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.²⁵

Q: We (the airline) strenuously object to this burden, of displacing Bob Jones (who is doing a great job) to employ Josephine Smith for a few months in a job for which she is only marginally qualified, while she recuperates from her injury. What happens if we just ignore her request to be reemployed, until she can return to the cockpit?

A: USERRA provides as follows about the remedies that the court is to award upon finding a violation of USERRA:

- (d) Remedies.
 - (1) In any action under this section, the court may award relief as follows:
 - (A) The court may require the employer to comply with the provisions of this chapter.
 - (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.
 - (C) *The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.*
 - (2) (A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
 - (B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.
 - (3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.
- (e) Equity powers. The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions,

²⁵ 38 U.S.C. 4302.

temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.²⁶

The court will order the airline to come into compliance and will use its equity powers to enforce its order. Individuals, as well as the company itself, can be held in contempt of court and can be sanctioned, including jail until compliance is achieved.

The court will order the airline to compensate Josephine Smith for the pay and benefits that she has lost because of the airline's failure to comply with USERRA, and if the court finds that the airline violated the law willfully it will double the damages.

Individual company officials, like the Chief Pilot, can also be held personally liable for violating USERRA. USERRA's definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated employment-related responsibilities."²⁷

Q: Who thought up this dumb idea of requiring employers to reemploy persons who serve in the military?

A: In 1940, Senator Elbert Thomas of Utah offered an amendment to the Selective Training and Service Act to require employers to reemploy returning veterans upon completing their honorable service. He convinced his congressional colleagues that:

It is not unreasonable to require the employers of such men [those who are called to the colors] to rehire them upon the completion of their service, *since the lives and property of employers, as well as the lives and property of everyone else in this country, are defended by such service.*²⁸

As we approach the 16th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that decade and a half we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, Active Component (AC) and Reserve Component (RC), have protected us all. According to the Department of Defense, 6,856

²⁶ 38 U.S.C. 4323(d) and (e) (emphasis supplied).

²⁷ 38 U.S.C. 4303(4)(A)(i) (emphasis supplied).

²⁸ 96 Cong. Rec. 10573 (statement of Senator Elbert Thomas) (emphasis supplied). Senator Thomas' eloquent statement is quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8th Cir. 1991).

military personnel have made the ultimate sacrifices in overseas military operations since 9/11/2001.²⁹

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 16 years, the clear majority of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 44 years ago, Congress abolished the draft and established the All-Volunteer Military (AVM). The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor. Our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that we never need to return to the draft. Maintaining the AVM requires that we provide incentives and minimize disincentives to serve among the young men and women who are qualified for military service.

I have written:

Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will

²⁹ See www.archive.defense.gov/news/casualty.pdf. This figure is as of 8/14/2015.

have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is a compelling government interest in the enforcement of USERRA.³⁰

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940, in 1994, and at all other relevant times. We as a nation are not drafting you, nor are we drafting your sons and daughters. You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

³⁰ Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.