

USERRA Precludes Employer-Initiated Lawsuits

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Update on Sam Wright

- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.4—USERRA enforcement
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Q: I am a Major 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).

Since 2005, I have worked for a major corporation—let’s call it Daddy Warbucks Industries or DWI. In the last dozen years, I have been away from my DWI job many times for short and long periods of military training and service. DWI management has continually given me a hard time about my absences from work for military service, although these absences are clearly protected by USERRA.

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 (VRRRA—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 VRRRA 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 VRRRA 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 or by telephone at 800-809-9448, ext. 730.

I have read your Law Review 16043 (May 2016), concerning USERRA's five-year limit. Many of my active duty periods in the last 12 years have been exempt from the five-year limit, but I have performed four periods that apparently are not exempt, and those periods add up to 2.5 years of service. Thus, I believe that I have used exactly half of my five-year limit with respect to my employer relationship with DWI.

Recently, I applied to the Army to perform a three-year Active Guard and Reserve (AGR) tour, and the Army has selected me for this opportunity, at least tentatively. It is very likely, but not certain, that I will be reporting to active duty on October 1, 2017, and my three-year tour will expire on September 30, 2020. I understand and accept that this voluntary three-year AGR tour is not exempt from the five-year limit and that if I serve the whole three years I will not have the right to reemployment at DWI.

I have not yet informed my DWI supervisor or the DWI personnel office that I have applied for this AGR opportunity, and I am reluctant to do so because whenever I inform my civilian supervisor of an upcoming period of service he gives me a very hard time. The last time that I was away from my DWI job for an extended period of military service, the DWI General Counsel threatened to bring a "declaratory judgment" action against me seeking a court determination that I will not have the right to reemployment upon return from the period of service.

How do you recommend that I handle this situation?

A: First, it should be noted that USERRA has a provision that specifically precludes the sort of declaratory judgment action that the company's General Counsel has threatened to file: "An action under this chapter [USERRA] may be initiated *only* by a person claiming rights or benefits under this chapter or by the United States under subsection (a)(1)."³

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA⁴ and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's legislative history includes a concise sentence explaining the purpose and effect of section 4323(f): "Section 4322(a)(5) [later renumbered as 4323(f)] would provide that only persons claiming rights or benefits under chapter 43 [USERRA] may initiate an

³ 38 U.S.C. 4323(f) (emphasis supplied). Under subsection (a)(1), 38 U.S.C. 4323(a)(1), a USERRA action may be initiated by the Attorney General of the United States, in the name of the United States, when the defendant-employer is a state government agency.

⁴ Public Law 103-353.

action; i.e., no declaratory judgment actions by employers, prospective employers, or other entities (such as pension plans or unions) can be filed.”⁵

If the General Counsel brings the threatened lawsuit, it will be summarily dismissed and the General Counsel will be personally sanctioned by the court for violating Rule 11 of the Federal Rules of Civil Procedure, which provides for sanctions against an attorney who initiates a claim that he or she knows or should know is without legal basis.

Because it is not 100% certain that you will be reporting to active duty on October 1, I suggest that you hold off on notifying DWI of this new period of military service. If on September 1 you have your Army orders in hand and it is reasonably certain that you will be reporting to active duty on October 1, that would be a good time to give notice to the employer.

If you give the company notice now, it is possible that the company will fire you. Such a firing would be clearly unlawful under section 4311 of USERRA,⁶ but it could happen and losing your income three months before the start of your active duty period could put you in a bind financially. Under USERRA, you have no obligation to inform the employer of an impending period of military service until you are on the eve of missing a day of work for the service.

When you give DWI notice that you will be leaving your job to report to active duty, you are not required to predict that you will be returning to the company and seeking reemployment after you are released from the period of service. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is

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 sentence can be found on page 686 of the 2016 edition of the *Manual*.

⁶ 38 U.S.C. 4311.

not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.⁷

If you are correct in your computation that you have already used half of your five-year limit with DWI, and if you serve the full three-year term for which you have applied, you will be over the five-year limit and will not have the right to reemployment at DWI. Nonetheless, I advise you to give notice to DWI before you leave to report to active duty, because it is possible that the Army will send you home early, before you exceed the five-year limit. For example, the Army could discharge you or medically retire you if illness or injury precludes you from meeting the Army's physical standards.

The point of USERRA is to keep your civilian job behind you as an unburned bridge. If you meet the five USERRA conditions after you are released from the period of service, you have the right to reemployment with the pre-service employer, regardless of what you knew, believed, or intended before or during the period of service. Although it is unlikely that you will be seeking reemployment with DWI, you should maintain this unburned bridge, just in case the Army sends you home early for whatever reason.

⁷ 20 C.F.R. 1002.88 (bold question in original).