

LAW REVIEW 17050¹

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Yes, AFTPs are Protected by USERRA

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Update on Sam Wright

- 1.1.3.1—USERRA applies to voluntary service
- 1.1.3.3—USERRA applies to National Guard service
- 1.3.1.2—Character and duration of service
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a Captain in the Washington Air National Guard (ANG), where I serve as a pilot. I am also a First Officer (co-pilot) for a major airline. I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The ANG requires me to participate in one “drill weekend” per month, but sometimes the “weekend” includes Friday and Monday as well as Saturday and Sunday. To maintain my proficiency as an Air Force pilot, I am also required to perform several Additional Flight Training Periods (AFTPs) each year, and this requirement is in addition to my drill weekends.

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 by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

I have some flexibility in scheduling the AFTP, but the aircraft are available for this purpose only on certain days and there are many other ANG and Air Force Reserve pilots who also must perform

AFTP using the same aircraft. On occasion, weather conditions or mechanical issues with the aircraft cause scheduled AFTP to be rescheduled.

The Chief Pilot and General Counsel of my civilian employer, Very Large Air Line (VLAL), have taken the position that USERRA does not give me the right to time off from my civilian job, even without pay, for AFTP, because they are “voluntary.” It is true that the Air Force does not require me to perform an AFTP on any one specific date, but I must meet the requirement during the year, and there are limited opportunities to perform an AFTP.

Are the Chief Pilot and General Counsel correct?

A: No, they are wrong. AFTP are a form of “inactive duty training” and clearly are within USERRA’s definition of “service in the uniformed services.” I addressed this issue in detail in Law Review 30 (October 2001), written in the immediate aftermath of the September 11 terrorist attacks. Because almost 16 years have passed, I will reiterate now what I wrote then.

As I have explained in Law Review 15116 (December 2015) and many other articles, a person has the right to reemployment after a period of uniformed service if he or she meets five simple conditions:

- a. Left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services as defined by USERRA.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service with respect to the employer relationship for which the person seeks reemployment.³
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, was timely in reporting back to work or applying for reemployment.⁴

³ There are nine exemptions—kinds of service that do not count toward exhausting the person’s five-year limit. Please see Law Review 16043 (May 2016).

⁴ After a period of service of fewer than 31 days, the service member must report to the employer “not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person’s residence.” 38 U.S.C. 4312(e)(1)(A)(i). After a period of service of 31-180 days, the person must apply for reemployment within 14 days. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, the person must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D).

Section 4303 of USERRA defines 16 terms used in this law. The term “service in the uniformed services” is defined as follows:

The term "service in the uniformed services" means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, *inactive duty training*, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.⁵

AFTPAs are a form of “inactive duty training” and are specifically included within USERRA’s definition of “service in the uniformed services.” Inactive duty training is not limited to weekends. A Reserve Component service member can perform inactive duty training on any day of the week.⁶

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA⁷ 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. The VRRA made confusing and cumbersome distinctions among categories of military training or service. Different subsections of the law, and different rules, applied to each category. USERRA eliminated these distinctions. Under USERRA, the rules depend upon the duration of the period of service, not the category.

Under the VRRA, there was a four-year cumulative limit on the duration of the periods of *active duty* that a person could be away from a job and still have the right to reemployment. The VRRA had no limit on the duration of a specific period of *active duty for training* or on the cumulative amount of time that a person could be away from a job for active duty for training.

After Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973, the services started asking some Reserve Component service members to perform active duty for training periods that were substantially longer than the traditional two-week period for such training. There was a 20-year argument in the courts as to whether there was a “rule of reason”

⁵ 38 U.S.C. 4303(13) (emphasis supplied).

⁶ Please see Law Review 16077 (August 2016).

⁷ Public Law 103-353, 108 Stat. 3162.

limiting the duration of active duty for training periods. Finally, in 1991, the Supreme Court put an end to that argument by holding, explicitly and unanimously, that there was no such implied limit.⁸

When Congress enacted USERRA in 1994, it included a provision that explicitly ratified the 1991 Supreme Court decision and precluded the application of any “rule of reason” under USERRA:

In any determination of a person’s entitlement to protection under this chapter [USERRA], the timing, frequency, and duration of the person’s training or service, or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements in subsection (a)(1) and the notification requirements established in subsection (e) are met.⁹

USERRA’s legislative history explains the purpose and effect of section 4312(h) as follows:

Section 4312(h) is a codification and amplification of *King v. St. Vincent’s Hospital*. This new subsection makes clear the Committee’s [House Committee on Veterans’ Affairs] intent that no “reasonableness” test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements of sections 4312(a) and (e).

The Committee believes, however, that instances of blatant abuser of military orders should be brought to the attention of appropriate military authorities (see *Hilliard v. New Jersey Army National Guard*, 527 F. Supp. 405, 411-412 (D.N.J. 1981)¹⁰), and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer’s desire that such service be planned for the employer’s convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.¹¹

⁸ See *King v. St. Vincent’s Hospital*, 502 U.S. 215 (1991).

⁹ 38 U.S.C. 4312(h).

¹⁰ I discuss the *Hilliard* case in detail in Law Review 15025 (March 2015).

¹¹ 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 paragraphs can be found on page 674 of the 2016 edition of the *Manual*.

Thus, it is clear beyond any question that you have the right to time off from your VLAL job (unpaid but job-protected) to perform AFTPAs as well as other forms of “service in the uniformed services” as defined by USERRA. You are not required to schedule or reschedule your AFTPAs in such a way as to minimize the airline’s inconvenience. Having said that, I urge you to try to schedule your AFTPAs for days when you are not scheduled to fly for the airline. As you gain more seniority at the airline and have some control over your airline flight schedule for the month, you should try to schedule your airline flights around the days when you know that you will be performing military duty. The point is to make this system work over the long term, for you and for Reserve Component personnel generally.