LAW REVIEW 17056[1]
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USERRA Does Not Permit a Declaratory Judgment Suit Initiated by the Employer

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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

Q: I am the Police Chief in an intermediate size city. We have a police officer on our force who has been away from his job (which began in 2005) for more than seven years, cumulatively, for military service in the Army Reserve. Let's call him Joe Smith.[3]

Smith is currently on voluntary active duty orders that expire on June 30, 2017. He has just sent me new orders that keep him on active duty until June 2018. We are tired of this burden, and we told him that he does not have our permission to remain on active duty past the end of June 2017 and that if he is not back at work by July 15 we will consider that he has abandoned his job. Moreover, the City Attorney is prepared to sue Smith in federal district court seeking a declaratory judgment that he has no reemployment rights with our police

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[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.

[3] This factual set-up is hypothetical but realistic.

department. Smith referred me to your "Law Review" articles at www.roa.org/lawcenter. What do you have to say about this situation?

A: First, USERRA has a provision that specifically precludes the sort of declaratory judgment lawsuit that the City Attorney claims to have in mind: "An action under this chapter may be initiated *only* by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1)."[4] USERRA's legislative history explains the purpose and effect of this subsection as follows: "Section 4322(d)(5) [later renumbered as 4323(f)] would provide that only persons claiming rights or benefits under chapter 43 [USERRA] may initiate an action; i.e., no declaratory judgment actions by employers, prospective employers, or other entities (such as pension plans or unions) can be filed."[5]

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA[6] in 1994, as a long-overdue rewrite of the Veteran's Reemployment Rights Act (VRRA), which was originally enacted in 1940. As I have explained in Law Review 15116 (December 2015) and many other articles, Joe Smith (or any service member or veteran) will have the right to reemployment under USERRA if he meets five simple conditions:

a. He must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services as defined by USERRA. Smith clearly meets this criterion.
b. He must have given the employer prior oral or written notice of the service. Smith gave such notice.
c. He must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he seeks reemployment. More on this condition below.
d. He must have been released from the period of service without having received a disqualifying bad discharge from the military.[7]
e. After release from the period of service, he must have made a timely application for reemployment.[8]

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[4] 38 U.S.C. 4323(f) (emphasis supplied).
[5] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1, reprinted in full 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] Public Law 103-353, 108 Stat. 3162. The citation means that USERRA was the 353rd new 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).
[7] Such a disqualifying bad discharge would include a bad conduct discharge, dishonorable discharge, dismissal, or other-than-honorable administrative discharge. 38 U.S.C. 4304.
[8] After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

Section 4312(c) of USERRA sets forth the five-year limit and the nine exemptions from the limit, as follows:

- Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's *cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment*, does not exceed five years, except that any such period of service shall not include any service--
    - **(1)** that is required, beyond five years, to complete an initial period of obligated service;
    - **(2)** during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
    - **(3)** *performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or*
    - **(4)** *performed by a member of a uniformed service who is--*
        - ***(A)*** *ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;*
        - **(B)** ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
        - **(C)** ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
        - **(D)** ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
        - **(E)** called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or
        - **(F)** ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.[9]

[9] 38 U.S.C. 4312(c) (emphasis supplied).

I explain the five-year limit and its exemptions in detail in Law Review 16043 (May 2016) and Law Review 16075 (August 2016). There are nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit.

Since he began his career with the police department in 2005, Smith has been away from his civilian job for 11 periods of Army Reserve training, and those periods are exempt from the five-year limit under section 4312(c)(3).[10] He has also been called to active duty *involuntarily* twice, from October 2007 to September 2008 and from October 2012 to September 2013. Those involuntary call-up periods are exempt from the five-year limit under section 4312(c)(4)(A).[11]

Moreover, it is only the *cumulative period of service in the uniformed services* that counts toward Smith's five-year limit, not the total time that he was away from work for uniformed service. For example, Smith was away from his police department job for active duty from September 15, 2014 (when he left his job to report to active duty) until December 27, 2015, when he applied for reemployment and returned to work. Although Smith left his job on September 15, his active duty period did not begin until October 1. The period of 16 days between his departure from the civilian job and his entry on active duty does not count toward exhausting his five-year limit.

Smith left active duty on September 30, 2015, but he did not apply for reemployment and return to work until 88 days later, on December 27. That 88-day period does not count toward exhausting Smith's five-year limit.

Smith was not required to work at his civilian job until the day before he entered active duty on October 1, 2014. He was entitled to several days to get his affairs in order before reporting for a combat deployment.[12] After he left active duty on September 30, 2015, Smith was entitled to wait up to 90 days before applying for reemployment.[13] He chose to wait 88 days, and his five-year clock was not running during that period.

Q: Enough with the technicalities. Smith's frequent and lengthy absences from work for military service put an unreasonable burden on me, the police department, and the city.

A: USERRA contains a provision that specifically precludes consideration of the "reasonableness" of Smith's duty periods.

Under the VRRA (reemployment statute before the enactment of USERRA in 1994), there were confusing and cumbersome distinctions among categories of military training or service. The

[10] 38 U.S.C. 4312(c)(3).
[11] 38 U.S.C. 4312(c)(4)(A).
[12] *See* 20 C.F.R. 1002.74. The citation is to title 20 of the Code of Federal Regulations, section 1002.74.
[13] 38 U.S.C. 4312(e)(1)(D).

VRRA had a four-year limit, but only active duty (not active duty for training) counted toward the four-year limit. The VRRA contained no explicit limit on the duration of an active duty for training period.

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" 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.[14]

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.[15]

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).
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> 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)[16]), 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

[14] *See King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).
[15] 38 U.S.C. 4312(h).
[16] I discuss the *Hilliard* case in detail in Law Review 15025 (March 2015).

> 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.[17]

Yes, USERRA puts a burden on civilian employers, but that burden is neither unreasonable nor unconstitutional. The burdens on employers are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform, and by their families. Please see Law Review 17055 (June 2017).

[17] 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.*