

## LAW REVIEW 17058<sup>1</sup>

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### USERRA Rights of the Returning Disabled Veteran

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Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments

1.3.2.9—Accommodations for disabled veterans

1.8—Relationship between USERRA and other laws/policies

**Q: I am the police chief of an intermediate size city. We have a police officer (let's call him Alexander Adams) who was called to active duty several years ago as a Marine Corps Reservist and deployed to Afghanistan, where he was wounded in action. The Marine Corps kept him on active duty for several years, while he had multiple surgeries and physical rehabilitation. He lost his left arm and left leg and was fitted with modern prosthetic limbs. Recently, the Marine Corps retired him with a substantial disability rating.<sup>3</sup>**

**A month ago, Alexander returned home and applied to me (the police chief) for reemployment. It is remarkable what prosthetic limbs can do today, but Alexander is certainly not capable of returning to work as a police officer. Alexander told me that the Uniformed Services Employment and Reemployment Rights Act (USERRA) requires the city to**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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 35 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](mailto: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.

<sup>3</sup> This factual set-up is hypothetical but realistic.

**reemploy him and make accommodations for his disability, and he referred me to your “Law Review” articles. What do you say about this situation?**

**A:** Yes, Alexander is entitled to be reemployed by the city in a position for which he is qualified or can become qualified, provided he meets the USERRA conditions for reemployment.

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA<sup>4</sup> 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).<sup>5</sup> 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.

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.<sup>6</sup>

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,<sup>7</sup> 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.<sup>8</sup> 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

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<sup>4</sup> Public Law 103-353, 108 Stat. 3162. The citation means that USERRA was the 353<sup>rd</sup> Public Law enacted during the 103<sup>rd</sup> 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.

<sup>5</sup> Public Law 76-783, 54 Stat. 885.

<sup>6</sup> 96 Cong. Rec. 10573. Senator Thomas’ eloquent statement is quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8<sup>th</sup> Cir. 1991).

<sup>7</sup> Public Law 77-213, 55 Stat. 626, 627.

<sup>8</sup> 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.

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.”<sup>9</sup> 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, Alexander Adams (or any service member or veteran) must meet five conditions to have the right to reemployment under USERRA:

- a. He 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 he did this when he was called to active duty.
- b. He must have given the employer prior oral or written notice. You have showed me a copy of the letter that he sent to the personnel office before he left his job to report to active duty.
- c. He 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 he sought reemployment.<sup>10</sup>
- d. He must have been released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA.<sup>11</sup> Alexander served honorably and did not receive a disqualifying discharge—indeed he was retired from the Marine Corps with a service connected disability.
- e. After release from the period of service, he must have made a timely application for reemployment.<sup>12</sup> You have stated that Alexander applied for reemployment almost immediately after he left active duty.

It is clear beyond question that Alexander met the conditions and was entitled to reemployment when he applied recently.

### **USERRA’s provisions for disabled veterans**

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<sup>9</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

<sup>10</sup> Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. Alexander’s active duty period did not count toward his five-year limit with the city because he was recalled to active duty involuntarily. See 38 U.S.C. 4312(c)(4)(A).

<sup>11</sup> 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.

<sup>12</sup> 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.

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:

- (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
  - (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.<sup>13</sup>

Section 4331 of USERRA<sup>14</sup> 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?**

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- 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

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<sup>13</sup> 38 U.S.C. 4313(a)(3).

<sup>14</sup> 38 U.S.C. 4331.

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.*<sup>15</sup>

Alexander's disability precludes him from returning to work as a police officer. I concede that there is no accommodation that the city can make that would enable Alexander to be a police officer again. Under section 4313(a)(3) of USERRA and section 1002.225 of the DOL USERRA Regulations, the city has a duty to reemploy Alexander in another position for which he is qualified, or can become qualified with reasonable employer efforts, and that is the closest approximation to the police officer position to which he would be entitled but for the disability.<sup>16</sup> The employer is the whole city government, not just the police department. Surely, there must be a job in the government for which Alexander is qualified or can become qualified with training, which the city is required to provide. The city must reemploy Alexander in such a position, even if that means displacing another employee.

**Q: This is a terrible burden on the city and on the other employee who may be displaced.**

**A:** In 1940 (when Congress enacted the VRRA), in 1994 (when Congress enacted USERRA), and at all other relevant times, Congress fully understood that this law puts burdens on employers and sometimes on the civilian colleagues of those who are called to the colors. The burdens imposed on employers and on the colleagues of those who serve are tiny as compared to the far 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). These requirements are neither unreasonable nor unconstitutional.

While serving as Judge Advocate General of the Army, Major General Scott C. Black<sup>17</sup> wrote: "No Soldier is more deserving of our best efforts than a Soldier wounded in combat. I encourage every JAG Corps member, military and civilian alike, to reach out to our wounded Soldiers and their families in every way possible."

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<sup>15</sup> 20 C.F.R. 1002.225 (bold question in original, emphasis by italics supplied).

<sup>16</sup> For further discussion of the USERRA rights of returning disabled veterans, please see Law Review 0640 (December 2006) and Law Review 0854 (November 2008).

<sup>17</sup> General Black was the Judge Advocate General of the Army from 2005 to 2009. While serving in that office, Congress enacted legislation upgrading the position of Judge Advocate General of the Army, Navy, and Air Force from the grade of O-8 (Major General or Rear Admiral) to the grade of O-9 (Lieutenant General or Vice Admiral), and General Black was promoted to Lieutenant General while on active duty and retired in that grade. He was still a Major General when he wrote the quoted words.