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USERRA Rights of the Returning Veteran Trump the Rights of the Incumbent

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Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.3.1.3—Timely application for reemployment
1.3.2.4—Status of the returning veteran
1.8—Relationship between USERRA and other laws/policies

Q: I am a GS-15 civilian employee of the Department of Defense (DOD), in the Pentagon.[3] I have never served in uniform, but I have worked for DOD for almost 25 years. I head up an office in the Pentagon and have 21 other employees reporting directly to me, and I report directly to an Army Lieutenant General. A colleague referred me to some of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "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 1300 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 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 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 real, but I have combined facts from three different individuals, plus some poetic license. As part of the poetic license, I have switched the identity of the questioner—I heard from the returning service members, not the federal supervisor.

Until July 2014, the colleague (let's call her "Mary Jones") headed up this office, holding the job I hold now. In that month, she gave DOD notice that she was leaving for one year to "play soldier" in the Army Reserve, where she is a Colonel. In July 2015, she told us that she was extending for a second year, and in July 2016 she told us that she was extending for a third year. She recently sent a letter to the Lieutenant General who is responsible for this office and several other offices, informing us that she left active duty on July 31, 2017 and that she will likely be applying for reemployment, but not yet. She claims that USERRA gives her up to 90 days to apply for reemployment and that she plans to use most of that 90 days to attend to some family responsibilities, which she did not detail.

When Mary left in July 2014, saying that she would be back in a year, DOD held the job open and I became the Acting Director of the office. In July 2015, when Mary extended for a second year, DOD announced the job as a vacancy, and I applied, along with lots of other employees. I was awarded the job on a permanent basis, and for me this was a promotion from GS-14 to GS-15. I earned this job and have done well in it, and I am not about to give it up to Mary Jones now that she is tired of playing soldier, or the Army is tired of her.

I have communicated with Mary several times, by e-mail, by letter, and by telephone, but she has not responded. Her only communication to DOD, since she left active duty on July 31, was her vague letter to the Lieutenant General.

I told Mary that she is welcome back in the office, and that she can keep her GS-15 grade, at least for a while, but I am now the head of the office, and she will be reporting to me.

I am concerned that Mary is delaying her application for reemployment while she schemes to displace me from my GS-15 position. What gives?

Answer, bottom line up front:

a. Yes, Mary has 90 days to apply for reemployment, because her period of service lasted longer than 180 days.[4] To have the right to reemployment, Mary must apply by October 29, 2017, which is exactly 90 days after July 31.
b. You must recuse yourself from any participation in decisions about Mary's reemployment rights, because you have a direct, foreseeable, and substantial conflict of interest.
c. Mary's rights as a returning veteran, under USERRA, trump your rights as the incumbent in the position that Mary left in July 2014. Mary is entitled to reemployment in the position that she would have attained if she had been continuously employed (probably the position she left), or in another position, for which she is qualified, that is of like

[4] 38 U.S.C. 4312(e)(1)(D).

seniority, *status,* and pay, even if that means that you must be displaced from the GS-15 supervisory position.

d. Your disparaging remarks about Mary's Army Reserve service (i.e., saying that she has been "playing soldier") are contrary to DOD policy and must not be tolerated.

Explanation

Deadline for Mary to apply for reemployment

Under section 4312(e) of USERRA,[5] the deadline to report back to work or apply for reemployment after a period of uniformed service depends upon the duration of the period of service from which the individual is returning. Here is the entire text of section 4312(e):

> **(e)**(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:
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> - **(A)** In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer--
>   - **(i)** 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 the safe transportation of the person from the place of that service to the person's residence; or
>   - **(ii)** as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.
>
> - **(B)** In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).
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> - **(C)** In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

[5] 38 U.S.C. 4312(e).

- **(D)** *In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.*

> **(2)** (A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.
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> - **(B)** Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.
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> - **(3)** A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.[6]

Under section 4312(e)(1)(D), italicized above, the deadline to apply for reemployment is 90 days after the end of a period of service that lasted longer than 180 days. The statutory language could not be clearer.

Most returning service members seek reemployment with their pre-service employers within a few days after release from the period of service, but it has always been the case that some service members want to wait, for various reasons. The reason Mary wants to wait is nobody's business but Mary's. DOD, as the pre-service employer, has no right to cut short the 90-day deadline for Mary to apply for reemployment.

You must recuse yourself from participating in decisions about Mary's reemployment.

I invite your attention to the following section of federal law:

> **(a)** Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer

[6] 38 U.S.C. 4312(e) (emphasis supplied).

> or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--
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> Shall be subject to the penalties set forth in section 216 of this title [18 U.S.C. 216].[7]

As I explain below, Mary's exercise of her USERRA rights could displace you from the GS-15 position that you hold because Mary vacated that position for active military service. Thus, your financial interest in the matter disqualifies you from participating in these decisions.

Conditions that Mary must meet to have the right to reemployment

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

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 2014.
b. She must have given the employer prior oral or written notice. She gave such notice.
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 seeks reemployment.[8]
d. She must have been released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA.[9] It is clear that she served honorably and did not receive a bad discharge.
e. After release from the period of service, she must have made a timely application for reemployment. As I have explained above, Mary has until October 29 to apply for reemployment.

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[7] 18 U.S.C. 208(a).

[8] Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting the individual's limit.

[9] 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. Mary served honorably and did not receive a bad discharge.

Mary clearly meets the first four conditions. When she applies for reemployment, on or before October 29, she will have the right to reemployment under USERRA.

When Mary meets the five conditions, what kind of a job is she entitled to under USERRA?

When Mary meets the five conditions, the employer (DOD) has an affirmative legal obligation to reemploy her promptly in the position that she would have attained if she had been continuously employed or another position, for she is qualified, that is of like seniority, status, and pay.

An employee returning to work after a period of service of more than 90 days, and who meets the five USERRA conditions, must be reemployed "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 [uniformed] service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform."[10] In Mary's case, it is clear beyond dispute that the position that she would have held if she had remained continuously employed, instead of leaving for military service, is the position that she left in July 2014 when she was called to the colors.

Does DOD have the flexibility to reemploy Mary in a different position?

Yes, but only if the other position is of like seniority, *status,* and pay, and only if she is qualified for that other position.

What is "status?"

As I explained in Law Review 15067 (August 2015), USERRA was enacted in 1994 as a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. USERRA made some major changes, but the concept of "status" has not changed from the VRR law to USERRA.

The VRR law did not give rulemaking authority to the Department of Labor (DOL), but DOL did publish a *VRR Handbook*. While employed as a DOL attorney, I co-edited the 1988 edition of that handbook, which replaced the 1970 edition. Several courts, including the Supreme Court, have accorded a "measure of weight" to the interpretations expressed in the *VRR Handbook*.[11]

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[10] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

[11] *See Monroe v. Standard Oil Co*., 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992); *Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers and Distributors Association*, 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Helton v. Mercury Freight Lines, Inc*., 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

The 1988 *VRR Handbook* has this to say about the concept of status:

> The statutory concept of 'status' is broad enough to include both pay and seniority, as well as other attributes of the position, such as working conditions, opportunities for advancement, job location, shift assignment, rank or responsibility, etc. Where such matters are not controlled by seniority or where no established seniority system exists, they can be viewed as matters of 'status.' In a determination of whether an alternative position offered is of 'like seniority, status, and pay,' all of the features that make up its 'status' must be considered in addition to the seniority and rate of pay that are involved."

USERRA's legislative history also addresses the issue of "status," as follows:

> Although not the subject of frequent court decisions, courts have construed status to include 'opportunities for advancement, general working conditions, job location, shift assignment, [and] rank and responsibility.' (*Monday v. Adams Packing Association*, *Inc.,* 85 LRRM 2341, 2343 (M.D. Fla. 1973).) *See Hackett v. State of Minnesota*, 120 Labor Cases (CCH) Par. 11,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of status. (*See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972)), as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation."[12]

We found a DOD GS-15 supervisory position in California that is right up Mary's alley. Can we make her accept that position?

No. Location (as in metropolitan commuting area) is a fundamental aspect of the "status" to which the returning service member or veteran is entitled under USERRA.

Concerning the insufficiency of the California position that you have in mind, I invite your attention to *Armstrong v. Cleaner Services.*[13] The plaintiff (Ronald D. Armstrong) was hired in November 1967 as the manager of one of the defendant's three One Hour Martinizing (dry cleaning) plants in Murfreesboro, Tennessee (Armstrong's home town). Armstrong worked in that manager position until March 1968, when he was drafted. He was honorably discharged in March 1970 and promptly applied for reemployment. The defendant was unwilling to reinstate Armstrong as manager of the facility where he had been employed because the manager

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[12] 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 676 of the 2016 edition of the *Manual.*

[13] 1972 U.S. Dist. LEXIS 15054 (M.D. Tenn. February 17, 1972). This case is cited in USERRA's legislative history, quoted above.

position at that facility was filled. The defendant offered Armstrong a similar position at Fort Oglethorpe, Georgia. Armstrong declined that offer and sued.

The case was assigned to Judge Leland Clure Morton of the United States District Court for the Middle District of Tennessee.[14] In his scholarly opinion, Judge Morton wrote:

> Under the facts of this particular case, plaintiff was entitled to be reinstated in his pre-induction position at one of defendant's three plants in Murfreesboro. To hold that plaintiff had no such rights under the Act would have the effect of penalizing plaintiff for serving his country in the Armed Services. In addition to the circumstance that plaintiff's wife was five to six months pregnant, the court must consider the financial burden which would necessarily be required of a removal to Georgia. No evidence was introduced to indicate that defendant would have paid any expenses resulting from such a move.
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> The fact that it had been the custom and policy of the defendant to shift managers from plant to plant does not justify the defendant's refusal to re-employ the plaintiff at the same place of employment. *See Salter v. Becker Roofing Co*., 65 F. Supp. 633 (M.D. Ala. 1946); *Mihelich v. F. W. Woolworth Co*., 69 F. Supp. 497 (D. Idaho 1946)). Nor does the mere fact that defendant has hired another to fill the vacated position make it unreasonable to require an employer to reinstate a veteran in that position. *Trusteed Funds v. Dacey*, 160 F.2d 413, 420 (1st Cir. 1947); *Salter v. Becker Roofing Co., supra*, at 636.[15]

Of course, Mary could accept the California position if she wants to move to that state.

Mary is entitled to a GS-15 supervisory position in the DC metropolitan area, and it must be a position for which she is qualified.

> **Where does it say that Mary's USERRA rights trump my rights as the incumbent in the position?**

I invite your attention to *Ryan v. Rush-Presbyterian-St. Luke's Medical Center.*[16] The plaintiff, Margaret A. Ryan, was a Nurse Corps officer in the Navy Reserve when she was called to active duty for Operation Desert Storm in 1991. On the civilian side, she was the nurse manager of a medical facility in Indiana. When she returned from active duty, the employer offered her the position of assistant nurse manager, with the same salary. Ryan refused to take the position of lesser status, and she sued the employer. The District Court granted the employer's motion for summary judgment, apparently based on "no harm no foul." Ryan appealed to the United

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[14] Judge Morton was appointed to the court by President Richard M. Nixon and confirmed by the Senate in 1970. He took senior status in 1984 and died in 1998.

[15] *Armstrong, supra,* at pages 5-6.

[16] 15 F.3d 697 (7th Cir. 1994).

States Court of Appeals for the 7th Circuit[17] and prevailed. The appellate court reversed the district court because the assistant nurse manager position was not equal in status to the manager position that Ryan held before she was called to the colors and almost certainly would have continued to hold but for her call to duty.

I also invite your attention to *Nichols v. Department of Veterans Affairs:*[18]

> 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 is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[19]

Both *Ryan* and *Nichols* were decided before the enactment of USERRA in 1994. Does that matter?

No, that does not matter. USERRA was not a new statute in 1994—it was a long-overdue rewrite of the 1940 VRR law. USERRA's legislative history makes clear that VRR case law is still relevant in interpreting USERRA:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved

[17] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[18] 11 F.3d 160 (Fed. Cir. 1993).

[19] *Nichols,* 11 F.3d at 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.

> over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[20]

The same legislative history makes clear that the fact that the returning veteran's job has been filled by another employee does not defeat the returning veteran's right to reemployment, even if reemploying the veteran necessarily means displacing another employee:

> The very limited exception [to the unqualified right to reemployment] of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof (*see Watkins Motor Lines, Inc. v. deGalliford,* 167 F.2d 274, 275 (5th Cir. 1948); *Davis v. Halifax County School System,* 508 F. Supp. 966, 969 (E.D.N.C. 1981) is only applicable "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran." *Davis, supra,* 508 F. Supp. at 968. "*It is also not sufficient excuse 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, supra. 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).[21]

In *Nichols,* and in the cases cited in the legislative history, quoted above, reinstating the returning veteran into an appropriate and sufficient position necessarily meant displacing another employee. For example, in *Nichols,* the GS-13 supervisory chaplain position that had been held by Nichols, before he left for active duty in the Air Force, and that was held by Walsh when Nichols returned from active duty, was the only GS-13 VA supervisory chaplain position in the Brockton-West Roxbury metropolitan area, so properly reinstating Nichols necessarily meant displacing Walsh. That stark choice may not be applicable to the position that Mary held before her call to the colors and that you now hold. There are probably many DOD supervisory GS-15 positions in the Pentagon and elsewhere in the DC metropolitan area for which Mary is qualified. Mary is entitled to one of those positions, even if none of those positions is currently vacant. Making the returning veteran's right to reinstatement contingent upon the existence of a vacancy at the application for reemployment would make a mockery of USERRA.

As a civilian employer, DOD must especially be a model in complying with USERRA.

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[20] 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 at pages 683-84 of the 2017 edition of the *Manual.*

[21] *Id.,* at pages 691-92 of the 2017 *Manual* (emphasis supplied).

In Law Review 16064 (July 2016) I wrote:

> I think that it is unconscionable that the Air Force, as a civilian employer, [in the case I discussed in that article] flouts USERRA. As I explained in Law Review 16055 (June 2016) and Law Review 16036 (April 2016), Congress has stated its expectation that the Federal Government should be a model employer in carrying out the provisions of USERRA [38 U.S.C. 4302(a)]. An armed force, when acting as a civilian employer, should be triply the model employer. How do we get the restaurant owner in Dayton to comply with USERRA when she learns that the Air Force, at nearby WPAFB [Wright-Patterson Air Force Base] flouts this law?

Similarly, I think that it is unconscionable that DOD, as your civilian employer and Mary's, has tolerated your disparaging remarks about Mary's Army Reserve service and has allowed you to participate in decisions about Mary's USERRA rights, despite your obvious conflict of interest and your disparaging remarks.