

## LAW REVIEW 17084<sup>1</sup>

August 2017

### An Instructive USERRA Case from the Central District of California

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Update on Sam Wright

- 1.1.1.7—USERRA applies to state and local governments
- 1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees
- 1.1.3.3—USERRA applies to National Guard service
- 1.3.1.2—Character and duration of service
- 1.3.2.2—Continuous accumulation of seniority—escalator principle
- 1.3.2.5—Rate of pay upon reinstatement
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- 1.4—USERRA enforcement

***Paxton v. City of Montebello, 712 F. Supp. 2d 1017 (C.D. Cal. 2010).***<sup>3</sup>

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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 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.

<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> These are two companion decisions, in the same case, by United States Magistrate Judge Rosalyn M. Chapman of the United States District Court for the Central District of California. She served as a Magistrate Judge of that court from 1995 until 2012. The citation means that you can find this decision in Volume 712 of *Federal Supplement, Second Series*, the volumes where decisions of United States District Courts are published. The first decision starts on page 1007 and the second on page 1017.

Johnnie Paxton and Brandon Contreras were members of the California Army National Guard, as traditional National Guard members.<sup>4</sup> On the civilian side, they were hired by the City of Montebello as police trainees on July 20, 2006. Both successfully completed their training and were employed as probationary police officers when they were called to active duty in May 2007. Both served honorably for one year and were released from active duty in May 2008. Both spent most of that year in combat in Iraq.

Paxton and Contreras met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>5</sup> Each plaintiff left his City of Montebello job to perform uniformed service and gave the city prior oral or written notice. Each was well within the five-year cumulative limit on the permissible duration of the period or periods of uniformed service, relating to his employer relationship with the city, and since they were involuntarily called to active duty this 2007-08 period of service did not count toward exhausting the individual's five-year limit.<sup>6</sup> Both Paxton and Contreras served honorably and did not receive disqualifying bad discharges from the Army. Both made timely applications for reemployment and returned to work on May 11, 2008.

The city reinstated Paxton and Contreras as probationary police officers and required them to complete the instruction and evaluation periods. Paxton and Contreras asserted that they would have completed the probationary periods prior to May 2008 if they had not been called to the colors, and both claimed to be entitled to reinstatement as police officers who had completed the probationary period. Judge Chapman correctly rejected that claim.

In May 2008, Paxton and Contreras were reinstated as probationary police officers and were paid at the rate that was applicable to probationary police officers. Paxton completed the probationary period requirements and was promoted on January 25, 2009, and Contreras completed the requirements and was promoted one month later. Judge Chapman held that they were entitled to seniority dates as full-fledged police officers, dating from the date when they would have been promoted but for the military interruption. She also awarded each man back pay—holding that they were retroactively entitled to the higher pay rate from May 2008 (when they returned to work) until early 2009, when they were promoted. She awarded them interest on the back-pay award and attorney fees.

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<sup>4</sup> As I have explained in Law Review 15091 (October 2015), members of the Army National Guard and Air National Guard are protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA) when they are away from their civilian jobs (federal, state, local, or private sector) for voluntary or involuntary training or duty under title 10 or title 32 of the United States Code. Army National Guard and Air National Guard personnel account for more than half of the personnel strength of our nation's seven Reserve Components and more than 500,000 of the one million Reserve Component personnel who have been called to the colors since the terrorist attacks of September 11, 2001.

<sup>5</sup> USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C 4301-35). Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA eligibility criteria.

<sup>6</sup> 38 U.S.C. 4312(c)(4)(A).

As I have explained in Law Review 17083, the immediately preceding article in this series, Judge Chapman held that Paxton and Contreras were entitled to annual leave from the City of Montebello for the one-year period that they were away from work for military service, based on a finding that other city employees on non-military leaves of absence of comparable duration continued accruing annual leave while on such leaves of absence.

Under section 4323(d)(1)(C) of USERRA,<sup>7</sup> she could have doubled their back-pay awards by awarding them liquidated damages, in the amount of the actual damages, if she had found the city's USERRA violation to be willful. She did not find willfulness and did not award liquidated damages.

Neither party appealed, and the deadline for appealing has long since passed. This case is over.

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<sup>7</sup> 38 U.S.C. 4323(d)(1)(C).