

The Civilian Employer Does Not Get a Veto

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.1.7—USERRA applies to state and local governments

1.3.1.1—Left job for service and gave prior notice

1.3.1.2—Character and duration of service

Q: I am a Captain in the Marine Corps Reserve and a member of the Reserve Officers Association (ROA). I am the same guy who asked the questions in Law Review 17086, the immediately preceding article in this “Law Review” series.

I am employed by the Commonwealth of Virginia. I gave my civilian supervisor six weeks of notice of my two weeks of Marine Corps Reserve annual training, scheduled for September 2017. My civilian supervisor, Vidkun Quisling, told me that he has denied my request for military leave and that if I miss work for those two weeks to “play soldier” he will write me up for insubordination and unauthorized absence and will get me fired. Mr. Quisling said that he has the authority to consider my request for military leave and to deny the request if the

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 (VRRRA—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 VRRRA 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 VRRRA 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.

timing is inconvenient for the civilian employer, and that he has done exactly that. What do you have to say about Mr. Quisling's contention?

A: Mr. Quisling is wrong. You do not need to ask for or obtain his permission to be absent from work for voluntary or involuntary military training or service. You are only required to give notice, and you have done so.

Section 4331 of USERRA³ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, DOL published proposed USERRA regulations in the *Federal Register*, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* in December 2005. The DOL final USERRA regulations are codified in title 20 of the Code of Federal Regulations (CFR), at Part 1002 (20 C.F.R. Part 1002). The most pertinent section is as follows:

1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.⁴

The DOL USERRA regulations also provide:

Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?

No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable. However, *the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's service to the attention of the appropriate military authority*. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.⁵

³ 38 U.S.C. 4331.

⁴ 20 C.F.R. 1002.87 (bold question in original).

⁵ 20 C.F.R. 1002.104 (bold question in original, emphasis by italics supplied).

Q: Mr. Quisling contends that the last two weeks of September, when my Marine Corps Reserve annual training is scheduled, is the busiest time of the year in our civilian office, and that I should be exempted from the requirement to attend this annual training because it is unduly burdensome on my civilian employer. To whom should Mr. Quisling make this argument?

A: You should give Mr. Quisling the name and contact information of the Commanding Officer of your Marine Corps Reserve unit. Mr. Quisling can make that point to your Commanding Officer. The Commanding Officer can exempt you from the requirement to perform this annual training period if he or she concludes that exempting you from the training, or allowing you to perform the training at another time, would not detract from the readiness of the unit.

Mr. Quisling needs to understand that Reserve Component (RC) units train together because they may well be required to go to war together. All or at least the great majority of unit members must train with the unit, every time. If you and other unit members do not train with the unit, that will inevitably detract from the effectiveness of the unit. That will mean more lives lost and a greater risk that the unit will not be able to accomplish its mission. Yes, it really is that important that you train with the unit at least the great majority of the time.

Q: Colonel Thelma Jones, USMCR is the Commanding Officer of my reserve unit. She is a part-timer, like me. The unit has more than 200 members. She told me that more than 10% of unit members have civilian employers who habitually object to being required to permit unit members to have time off from their civilian jobs for Marine Corps Reserve training and service. Colonel Jones asked me not to give Mr. Quisling her name and contact information. She said that if 20 civilian employers of unit members start calling her regularly at her civilian job, during her working hours, that will endanger her own job. What do you say about that?

A: Colonel Jones makes an excellent point, and I have made exactly that point in Law Review 14009 (January 2014) and Law Review 17064 (June 2017). I have suggested that each Reserve Component needs to designate a full-timer, at the regional or national level, to receive and respond to inquiries and complaints by civilian employers. I have seen no evidence that my suggestion is being implemented, so I reiterate the suggestion now.

Q: Who must notify the civilian employer of an upcoming period of uniformed service?

A: USERRA provides that the notice must be provided by the individual service member “*or an appropriate officer of the uniformed service in which the service is to be performed.*”⁶ In Law Review 14009 and Law Review 17064, and other articles, I have suggested that each Reserve Component should designate appropriate officers to notify civilian employers of upcoming service periods. The appropriate officer who is giving the notice should be a full-timer and should be above the level of the Commanding Officer of the Reserve or National Guard unit.

⁶ 38 U.S.C. 4312(a)(1) (emphasis supplied).

The notice to the employer should contain the following sentence: "If you have questions or complaints, please direct those questions and complaints to me. Please do not harass the individual service member who is your employee." The individual service member, especially a junior enlisted service member, should not have to face his or her employer's wrath alone.

Q: Mr. Quisling has complained that my Marine Corps Reserve service puts an inordinate burden on him, as my supervisor, and on the agency, as my employer. What do you say about that?

A: As I have explained in detail in Law Review 17055 (June 2017), Congress fully understood that this law puts some burdens on civilian employers and supervisors, but that burden is tiny as compared to the far greater burden (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform, and by their families.

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). Without a law like USERRA, the services would not be able to recruit and retain a sufficient quantity and quality of young men and women to defend our country. Mr. Quisling: Nobody is drafting you, and nobody is drafting your children and grandchildren. But somebody must defend our country. You should stop your whining about the "burdens" imposed on you, as the civilian supervisor of those who serve in your place and in the place of your offspring. Please see Law Review 17055.