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Location Is an Aspect of Status

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1.3.2.4—Status of the returning veteran
1.4—USERRA enforcement

Q: I am a Commander (O-5) in the Navy Reserve and a life member of the Reserve Officers Association (ROA). I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

For many years, I have worked for a major corporation—let's call it Daddy Warbucks Industries or DWI. For my entire career at the company, I have worked at DWI's Northern California district office in

San Francisco, and in 2012 I was promoted to be the director of that office, when the long-term office director retired. He spent his entire 40-year DWI career at the San Francisco office, and he was the director of that office for the last 20 years before he retired. I was his deputy and was promoted to replace him when he retired in 2012.

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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.

Mary Jones was my deputy when I was involuntarily called to active duty in July 2016, for one year. I recommended that Mary Jones take over as the director of the district office during my year of active duty, and the company implemented my recommendation. As I could have predicted, because I trained her well, Mary did an outstanding job. When I was released from active duty and applied for reemployment in July 2017, the company made me the director of the Los Angeles district office, over my strenuous objection.[3]

It is essentially impossible for me to move my family to Los Angeles. My wife has a great job in San Francisco, and she is unwilling to move. My two children are in high school, and they want to remain in the same school through graduation.

Did DWI violate USERRA when it reinstated me in Los Angeles rather than San Francisco?

A: Almost certainly yes.

First, we must establish that you met the five USERRA conditions for reemployment. It seems clear that you did. You clearly left your DWI job to perform uniformed service in July 2016. I shall assume that you gave DWI prior oral or written notice. Because you were called to active duty involuntarily, your recent year of active duty does not count toward exhausting your five-year limit with DWI.[4] You are still in the Navy Reserve, so clearly you did not receive a disqualifying bad discharge from the Navy.[5] After a period of service of 181 days or more, you have 90 days to apply for reemployment.[6] You clearly made a timely application for reemployment.

If you met the five conditions, and it seems clear that you did, you were entitled to be reemployed "in the position of employment in which the person [you] *would have been employed if the continuous employment of such person with the employer had not been interrupted by such service,* or a position of like seniority, *status* and pay, the duties of which the person is qualified to perform."[7] The position in which you would have been employed if your DWI career had not been interrupted is not necessarily the position that you left, but in your case it seems very likely that if you had not been called to the colors in July 2016 you would still be the director of the DWI office in San Francisco.

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[3] According to Mapquest, it is 381 miles from the City Hall in San Francisco to the City Hall in Los Angeles, and the trip takes five hours and 46 minutes by automobile.
[4] 38 U.S.C. 4312(c)(4)(A).
[5] Under section 4304, 38 U.S.C. 4304, disqualifying bad discharges included punitive discharges (by court martial) and other-than-honorable administrative discharges.
[6] 38 U.S.C. 4312(e)(1)(D).
[7] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

It is very significant that Mary Jones was promoted into the director position when you were called to active duty, and she is still the director. Those facts show that if you had not been called to active duty you would still be the director in San Francisco. It is also significant that your predecessor as director served his entire 40-year career in San Francisco, including the last 20 years as the director in that office.

Location is an aspect of status.

It seems clear that you are entitled to reemployment because you meet the five conditions. It also seems clear that if you had not been called to the colors you would still be the director of the DWI office in San Francisco. DWI has some flexibility, to reemploy you in another position (for which you are qualified) that is of like seniority, *status* and pay. Location, as in commuting area, is a critical aspect of the status to which the returning veteran is entitled. There probably is no other DWI position in the San Francisco metropolitan area that is equivalent in status to the director position that you left in 2016 and almost certainly would have continued to hold, but for your call to the colors.

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*.[8]

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."

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[8] *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).

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."[9]

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 Los Angeles position, I invite your attention to *Armstrong v. Cleaner Services.*[10] 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 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.[11] 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.

[9] 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 (emphasis supplied). The quoted paragraph can be found on page 676 of the 2016 edition of the *Manual.*

[10] 1972 U.S. Dist. LEXIS 15054 (M.D. Tenn. February 17, 1972). This case is cited in USERRA's legislative history, quoted above.

[11] 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.

> 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.[12]

Your USERRA rights trump Mary's rights as the incumbent in the position.

I invite your attention to *Ryan v. Rush-Presbyterian-St. Luke's Medical Center.*[13] 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 States Court of Appeals for the 7th Circuit[14] 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:*[15]

> 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*,

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[12] *Armstrong, supra,* at pages 5-6.
[13] 15 F.3d 697 (7th Cir. 1994).
[14] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.
[15] 11 F.3d 160 (Fed. Cir. 1993).

> 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.[16]

In your case, as in *Nichols,* the director position that you left and almost certainly would have continued to hold is the only position of like status, because location in the San Francisco metropolitan area is part of the status to which you are entitled and there probably is no other equivalent position in the San Francisco area for which you are qualified. Thus, you are entitled to the director position, even if that means that Mary Jones must be displaced.

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 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).[17]

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

[16] *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.

[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 paragraph can be found at pages 683-84 of the 2017 edition of the *Manual.*

> (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).[18]

Q: If I prevail in my lawsuit against DWI, what relief is the court likely to award?

A: USERRA provides as follows concerning the remedies that a federal district court is to award to the successful USERRA plaintiff:

> In any action under this section, the court may award relief as follows:
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> - **(A)** The court may require the employer to comply with the provisions of this chapter.
> - **(B)** The court may require the employer to compensate the person for any *loss of wages or benefits* suffered by reason of such employer's failure to comply with the provisions of this chapter.
> - **(C)** The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.[19]

Under section 4323(d)(1)(A), the court can and probably will order the employer (DWI) to comply with USERRA. That means that the court will order the employer to reinstate you to the office director position in San Francisco, even if that necessarily means displacing Mary Jones, who was promoted into the position when you were called to active duty in July 2016. But that will take a while.[20] Even if the court grants summary judgment,[21] the case cannot be decided until after the discovery process has been completed, and that can take many months.

Under section 4323(d)(1)(B), the court will award you, if you prevail, a money damage award to compensate you for the "loss of wages or benefits" that you have lost because of the

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[18] *Id.,* at pages 691-92 of the 2017 *Manual* (emphasis supplied).
[19] 38 U.S.C. 4323(d)(1) (emphasis supplied).
[20] Act III, Scene 1 of *Hamlet* is the famous "to be or not to be" soliloquy. While contemplating suicide, Prince Hamlet recites a long list of all that is wrong with human life, and "the law's delays" is one item in that list. *Hamlet* was first performed in 1603, 414 years ago. Judicial delay has only gotten worse over the last four centuries.
[21] It is very unusual but not unprecedented for the court to grant summary judgment for the plaintiff employee in an employment case.

employer's USERRA violation. As I have explained in detail in Law Review 15088 (October 2015), USERRA only provides for a court to award *pecuniary* damages.[22]

You do not have a lot in the way of pecuniary damages, because the Los Angeles job pays just as much as the San Francisco job to which you are entitled. Your big complaint, as I understand it, is that you are denied the companionship of your wife and two children most of the time, because you work in Los Angeles, 381 miles away from your family home in San Francisco. This loss of companionship claim is an example of nonpecuniary damages for which USERRA, as presently written, does not provide a monetary remedy.

You have some pecuniary damages, because you must pay the extra expense of an apartment or hotel room in Los Angeles, within a reasonable commuting distance of your Los Angeles job. But even if your case drags on for years the pecuniary damages that can be awarded to you, under USERRA as presently written, would only amount to a few thousand dollars.

Under section 4323(d)(1)(C),[23] the court has the authority to award you *liquidated damages,* in the amount of the actual damages, and in addition to those damages, thus doubling the award, if the court finds that the employer violated USERRA willfully. Because you can only recover pecuniary damages under USERRA, the amount of the cash recovery will not be huge, even if it is doubled.

Q: I have consulted with several attorneys, including attorneys who regularly handle USERRA cases for plaintiffs, and no lawyer is willing to take on my case on a contingent fee basis. Why is that?

A: To take on a case on a contingent fee basis, wherein the lawyer is paid only if the plaintiff prevails and recovers money damages, the lawyer must be convinced that there is a strong likelihood of success *and* that the plaintiff will receive a substantial cash award, from which the attorney can collect a contingent fee that is worthy of the effort and risk that the case entails. In your case, as I have explained, there is only a limited prospect of recovering money damages.

Q: I thought that USERRA provides for the court to order the defendant employer to pay the attorney fees of the plaintiff veteran. Would an attorney be willing to take my case based on the prospect of collecting attorney fees from the employer?

A: Yes, USERRA provides for ordering the defendant employer to pay the attorney fees of the prevailing plaintiff who prevails, as follows:

> In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court

[22] In Law Review 15088, I proposed that Congress amend USERRA to provide for nonpecuniary damages, using as a model the Civil Rights Act of 1991. No such amendment has been enacted.
[23] 38 U.S.C. 4323(d)(1)(C).

> *may* award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.[24]

Because the awarding of attorney fees to the prevailing USERRA plaintiff is permissive rather than mandatory, it is unlikely that an attorney would undertake to represent you solely based on the prospect of collecting attorney fees from the defendant.

Q: Would it be possible for me to find an attorney to take my case on a pro bono (no fee) basis?

A: No.

The American Bar Association (ABA) operates the ABA Military Pro Bono Project.[25] The Project explains itself as follows:

> The ABA Military Pro Bono Project accepts case referrals from military attorneys on behalf of junior-enlisted, active-duty military personnel facing civil legal issues, and it places these cases with pro bono attorneys where the legal assistance is needed. The Project is also the platform for Operation Stand-By, through which military attorneys may seek attorney-to-attorney guidance.

Because you are an O-5, it is most unlikely that an attorney would agree to represent you on a pro bono basis.

Q: How do you suggest that I proceed?

A: I suggest that you file a formal, written USERRA complaint against DWI with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).[26] Please see Law Review 17081 (August 2017).

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[24] 38 U.S.C. 4323(h)(2) (emphasis supplied).
[25] Go to www.militaryprobono.org.
[26] You can file such a complaint on-line at www.dol.gov/vets.