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FEMA Reservists Do Not Have Reemployment Rights under USERRA

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

1.1.3.6—USERRA applies to National Disaster Medical System service

1.1.3.6a—USERRA applies to Urban Search & Rescue service

1.1.3.6b—USERRA and FEMA reservists

Q: I am a reservist for the Federal Emergency Management Agency (FEMA), in the United States Department of Homeland Security (DHS). I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does USERRA apply to me as a FEMA reservist?

FEMA has several thousand reservists—we are intermittent federal employees. We are paid when we are called to duty for emergencies created by natural disasters or terrorist attacks. I am currently on FEMA duty in Texas, for the Hurricane Harvey recovery effort.

When I am not on FEMA duty, I work for a restaurant in my home town. When I heard from FEMA that I was being called to duty for 30 days, I notified the owner-operator of 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 (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.

restaurant, and he congratulated me for signing up to go to Texas to help our fellow citizens who lost cars, homes, and in some cases loved ones to the hurricane winds and floods, and he said that my job at the restaurant was safe. Recently, FEMA extended my duty from 30 days to 79 days, and I notified the restaurant owner by e-mail and telephone. He told me that he could not afford to hold my job open for that long and that he was hiring somebody to replace me, and that I will need to find a new job somewhere else when I return from my FEMA reservist duty.

Have my USERRA rights been violated?

Answer, bottom line up front:

No. USERRA applies to voluntary or involuntary service in the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service. Under a recent (December 2016) amendment, USERRA applies to Urban Search & Rescue (US&R) personnel, under the cognizance of FEMA.³ Under a separate law enacted in 2002, National Disaster Medical System (NDMS) personnel have the right to reemployment in their civilian jobs after NDMS service.⁴

USERRA does not apply to FEMA reservists. Making USERRA apply to folks like you would require a statutory amendment. Neither USERRA nor any other federal statute gives you the right to insist that a civilian employer reinstate you when you return from a period of FEMA reservist duty.

Q: One of my FEMA reservist colleagues gave me a copy of H.R. 4998, the “Disaster Assistance Employment and Reemployment Rights Act of 2006.” She told me that I have the right to reemployment at the restaurant under this 2006 law. What gives?

A: H.R. 4998 was a bill introduced during the 109th Congress (2005-06). The bill was referred to committee but not reported out. The bill was not enacted during the 109th Congress, and no such bill was enacted during the 110th Congress, the 111th Congress, the 112th Congress, the 113th Congress, the 114th Congress, or in the 115th Congress so far.

You need to understand that there is a huge difference between a bill and a law. Congress is a giant funnel. Thousands of bills are introduced. Only a few score of new laws are enacted.

³ Please see Law Review 17011 (February 2017), by Raymond Shin and myself.

⁴ 42 U.S.C. 300hh-11(e)(3). I discuss that law in detail in Law Review 100 (December 2003).

UPDATE—October 2022

On 9/29/2022, President Biden signed into law the Civilian Reservist Emergency Workforce Act. As a result of this new enactment, reservists for the Federal Emergency Management Agency (FEMA) now have the same rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) as Army Reservists or other Reserve Component service members. This new law is effective as of the date of enactment, 9/29/2022. It is not retroactive.

Here is a link to a FEMA press release about the Civilian Reservist Emergency Workforce Act:

<https://www.fema.gov/fact-sheet/employment-and-reemployment-protections-reservists-faqs#:~:text=The%20Civilian%20Reservist%20Emergency%20Workforce%20%28CREW%29%20Act.%20This,to%20disasters%20and%20emergencies%20on%20behalf%20of%20FEMA.>