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Being a Supervisor Is Part of the Status to which the Returning Veteran Is Entitled to under USERRA

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Update on Sam Wright

1.1.1.7—USERRA applies to the Federal Government
1.3.2.4—Status of the returning veteran

Q: I am a Colonel in the Army 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).

I have been a civilian employee of the Department of Defense (DOD) since 1991. I was recently away from my civilian job for active duty for four years, from October 1, 2013 until September 30, 2017. When I left the job in September 2013, I was a GS-15 supervisor and the head of a Pentagon office with 30 employees. After I was called to the colors, the GS-14 who was my deputy was promoted to GS-15 and made the head of the office. Now that I have returned to work, I am still a GS-15 in the same office, but I am no longer a supervisor. In fact, I report to the same woman who was my subordinate four years ago.

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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 the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 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.

I have read and reread your Law Review 15116 (December 2015), and I think that it is clear beyond challenge that I met the five USERRA conditions for reemployment. I left my job for service and gave oral and written notice. I have not exceeded the five-year cumulative limit on the duration of my periods of uniformed service, relating to my employer relationship with the Federal Government. I served honorably and did not receive a disqualifying bad discharge from the Army. I made a timely application for reemployment and returned to work well within the 90-day deadline.

I want to be a GS-15 supervisor, because I am striving for promotion to the Senior Executive Service (SES), and doing well in a supervisory GS-15 position is probably a condition precedent to such a promotion. Does USERRA entitle me to be a GS-15 supervisor?

A: Yes. Being a supervisor, rather than a supervisee, is clearly part of the "status" to which you are entitled under USERRA.

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."[3] In your case, it is clear beyond dispute that the position that you would have held if you had remained continuously employed, instead of leaving for military service, is the position that you left in 2013 when you were called to the colors.

Q: Does DOD have the flexibility to reemploy me in a different position?

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

Q: 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

[3] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

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*.[4]

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."[5]

Regarding supervisory role as an aspect of status, I invite your attention to *Ryan v. Rush-Presbyterian-St. Luke's Medical Center.*[6] 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[7] 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

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[4] *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).

[5] 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.*

[6] 15 F.3d 697 (7th Cir. 1994).

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

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:*[8]

> 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.[9]

Q: 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."

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[8] 11 F.3d 160 (Fed. Cir. 1993).

[9] *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.

> *See Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[10]

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).[11]

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 is not applicable to the position that you held before your call to the colors and that your former deputy now holds. There are many DOD supervisory GS-15 positions in the Pentagon and elsewhere in the DC metropolitan area for which you are qualified. You are 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.

Q: In some of your articles, you have argued that as a civilian employer, DOD must especially be a model in complying with USERRA. Do you think that this principle applies to my case?

A: Yes. 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

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[10] 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.*

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

> 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, has refused to reemploy you in a supervisory GS-15 position.