

## The Collective Bargaining Agreement Cannot Deprive the Service Member of the Right To Bid on a Vacation Time

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[Update on Sam Wright](#)

1.2—USERRA forbids discrimination

1.3.2.11—Vacations, holidays, and days off

1.8—Relationship between USERRA and other laws/policies

**Q: I am an ombudsman for the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR). For many years, I have read and utilized your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) in helping me to understand the rights of Reserve and National Guard personnel and to explain those rights to the civilian employers of those personnel.**

**I am working a case about an Air Force Reserve Major who was away from her civilian job for active duty for Fiscal Year (FY) 2017, from 10/1/2016 until 9/30/2017. On the civilian side, she**

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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 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.

<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 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).

is a pilot for a unionized commuter airline. Let's call her Josephine Smith, and let's call the airline Table Airlines.

It appears to be clear beyond question that Smith met the five conditions for reemployment under USERRA, as you have discussed in Law Review 15116 (December 2015) and many other articles. She left her job to go on active duty and gave the airline prior oral and written notice. This year of active duty did not put her over the five-year cumulative limit on the duration of her period or periods of uniformed service, with respect to her employer relationship with the airline. She served honorably and did not receive a disqualifying bad discharge from the Air Force. After she was released from active duty, she applied for reemployment the next day, well within the 90-day deadline.

When Smith left her job to go on active duty in late September 2016, she had 14 days of vacation in the bank. At the time, I explained to her that under section 4316(d) of USERRA<sup>3</sup> she had the right but not the obligation to use, during her period of service, the 14 days of vacation that she had accrued prior to the start of her active duty period. She chose not to use her 14 vacation days during her active duty period, because she wanted to preserve those vacation days to use after returning to work for the airline.

Under the collective bargaining agreement (CBA) between Table Airlines and the pilots' union, pilots have seniority--based on how long they have been employed by the airline. Each month, each pilot (captain or first officer) submits a bid for his or her schedule for the next month. Pilots who have a lot of seniority generally get what they have bid for, and the more junior pilots get what is left.

The CBA also provides that each pilot is to submit a bid during the month of November, for the time that he or she wants to take vacation during the next calendar year. Smith recently submitted her bid for the time during 2018 that she will use her 14 days of earned vacation. The airline rejected her bid, saying that the CBA between the airline and the union provides that a pilot is not eligible to submit a vacation bid unless he or she worked at least 70 hours per month in at least eight of the first ten months of the preceding year. Smith does not meet this requirement because she was on active duty for the first nine months of 2017, until she was released from active duty on 9/30/2017.

Smith contends that depriving her of the right to take vacation in 2018 based on her having been on active duty for most of 2017. What do you think?

A: I believe that depriving Smith of the opportunity to take a vacation in 2018 because she performed military service in 2017 violates section 4311(a) of USERRA, which provides:

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<sup>3</sup> 38 U.S.C. 4316(d).

A person who is a member of, applies to be a member of, performs, *has performed*, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or *any benefit of employment* by an employer on the basis of that membership, application for membership, *performance of service*, application for service, or obligation.<sup>4</sup>

Smith was denied the opportunity to take a vacation in 2018 *because* she performed uniformed service in 2017. If she had not performed service in 2017, she would have had the same opportunity as her colleagues to take a vacation in 2018.

Section 4303 of USERRA defines 16 terms used in this law. The term “benefit of employment” is defined as follows:

The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, *vacations, and the opportunity to select work hours or location of employment.*<sup>5</sup>

The opportunity to bid for vacation days is a benefit of employment, and Smith was denied that benefit because she performed uniformed service.

**Q: What is the relationship between USERRA and the CBA between the airline and the pilots' union?**

**A:** USERRA is a floor and not a ceiling on the rights of Smith and other service members or veterans who are employed by Table Airlines or who apply for such employment. The CBA can give Smith *greater or additional rights, but it cannot take away rights conferred by USERRA.* Section 4302 of USERRA provides:

- **(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or

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<sup>4</sup> 38 U.S.C. 4311(a) (emphasis supplied).

<sup>5</sup> 38 U.S.C. 4303(2) (emphasis supplied).

other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

- **(b)** *This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.*<sup>6</sup>

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. There have been 16 Supreme Court decisions under the VRRA and one (so far) under USERRA.<sup>7</sup>

In its first case construing the VRRA, the Supreme Court held: “No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act.”<sup>8</sup>

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<sup>6</sup> 38 U.S.C. 4302 (emphasis supplied).

<sup>7</sup> Please see Category 10.1 of our Law Review Subject Index. You will find a detailed case note on each of these decisions.

<sup>8</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (emphasis supplied). The citation means that you can find this decision in Volume 328 of *United States Reports*, and the decision starts on page 275. The sentence quoted can be found on page 285. Please see Law Review 0801 (January 2008) for a detailed discussion of this case.