

You Don't Need an Honorable Discharge To Have the Right to Reemployment under USERRA

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

[Update on Sam Wright](#)

1.3.1.2—Character and duration of service

Q: I am the owner-operator of a small diner—I have only ten employees. One employee (let's call him Joe Smith) is a member of the Army National Guard. Joe was called to active duty for one year, from 10/1/2016 until 9/30/2017. He deployed with his unit to somewhere in Southwest Asia. He applied for reemployment at the diner on 11/1/2017, more than a month after he left active duty. I am contacting you because while doing an Internet search I found some of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

When Joe applied for reemployment, I asked to see his honorable discharge—my father told me about the honorable discharge that he received at the end of World War II. Joe told me that he does not have an honorable discharge and that he has not been discharged, only

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 (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.

released from active duty. He gave me a copy of a form that he called a “DD-214.” What is a DD-214? Is it correct that Joe does not need an honorable discharge to have the right to reemployment?

A: When a member of the National Guard or Reserve leaves active duty, he or she does not ordinarily get *discharged* by the military. The word discharge implies that the individual’s membership in the uniformed service has ended. Joe was not discharged—he was simply released from active duty, and he returned to the status of part-time National Guard member.

The DD-214 is the form that a service member (Army, Navy, Marine Corps, Air Force, or Coast Guard) receives when he or she leaves active duty. The form shows the date the person entered the period of active duty and the date that he or she left active duty, and it shows that the person’s service was honorable or other-than-honorable. The fact that Joe is still a member of the Army National Guard demonstrates that his service has been honorable. If his service had been other-than-honorable, he would have been discharged instead of released from active duty.

Let me mention my own situation. I was initially on active duty from 1/3/1977 until 3/31/1980, after I graduated from law school and passed the bar exam. When I left active duty in 1980, I received a DD-214. After I left active duty, I affiliated with the Navy Reserve. I have 14 more DD-214s, for periods of service that I performed in 1982, 1993, 1994, 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003. In 2007, I reached my mandatory retirement date, based on 30 years of commissioned service, and I transferred to the Inactive Status List, colloquially called the “gray area retiree” status. In May 2011, I attained the age of 60 and retired from the Navy Reserve. I have 15 DD-214s but no discharge.

Joe had the right to reemployment at the diner when he applied for reemployment on 11/1/2017 if he met the five USERRA conditions. As I have explained in Law Review 15116 (December 2015) and many other articles, any person who meets five simple conditions has the right to reemployment under USERRA:

- a. Left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service, as defined by USERRA.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which the person seeks reemployment.
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.
- e. Made a timely application for reemployment, after release from the period of service.

It seems clear that Joe met these five conditions. You were aware that he was away from work for service, so it must be true that he gave you notice. He was called to active duty involuntarily, so his 2016-17 active duty period does not count toward his cumulative five-year limit.³ Because his period of active duty lasted more than 180 days, Joe had 90 days (starting on the day he was released from active duty) to apply for reemployment.⁴ Joe's application for reemployment on 11/1/2017 was well within the 90-day deadline.

Section 4304 of USERRA enumerates the kinds of bad discharges that disqualify a person from reemployment, as follows:

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

- (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.
- (2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.
- (3) A dismissal of such person permitted under section 1161(a) of title 10.
- (4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.⁵

An enlisted service member who is convicted by court martial of a serious crime can receive a bad conduct discharge or dishonorable discharge as part of the sentence. Similarly, a commissioned officer can be dismissed from the service as part of a court martial conviction for a serious offense. A service member (officer or enlisted) whose service was substantially unsatisfactory can receive an "other than honorable" administrative discharge, but such a bad discharge normally requires an administrative hearing.

A commissioned officer of one of the five armed forces can be "dropped from the rolls" of his or her service, but only under very limited circumstances, as follows:

The President or the Secretary of Defense, or in the case of a commissioned officer of the Coast Guard, the Secretary of the department in which the Coast Guard is operating when it is not operating in the Navy, may drop from the rolls of any armed force any commissioned officer (1) who has been absent without authority for at least three months, (2) who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial, or (3) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having

³ 38 U.S.C. 4312(c)(4)(A).

⁴ 38 U.S.C. 4312(e)(1)(D).

⁵ 38 U.S.C. 4304.

been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.⁶

Over a period of many centuries, courts in Great Britain, the United States, and other common law countries have developed *rules of statutory construction*, and these rules are used to interpret statutes, regulations, contracts, wills, and other legal documents. One of the rules is *expressio unius est exclusio alterius*—to express one is to exclude all the others. Section 4304 of USERRA enumerates the specific kinds of discharges that disqualify a person from the right to reemployment. This enumeration necessarily means that other less-than-great discharges, including general discharges under honorable conditions, do not disqualify the veteran from reemployment.⁷

Joe Smith met the five USERRA conditions and you had a clear duty to reemploy him promptly (within two weeks after his application for reemployment)⁸ in the position of employment that he would have attained if he had been continuously employed or another position (for which he is qualified) that is of like seniority, status, and pay.⁹

⁶ 10 U.S.C. 1161(b).

⁷ See *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008). See also *Petty v. Metropolitan Government of Nashville*, 687 F.3d 710 (6th Cir. 2012). The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

⁸ 20 C.F.R. 1002.181.

⁹ 38 U.S.C. 4313(a)(2)(A).