LAW REVIEW 17127[1]
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USERRA Applies to Small Employers

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Update on Sam Wright

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Q: I am the same guy who asked the questions in Law Review 17126, the immediately preceding article in this series. I am the owner-operator of Bob & Edward's Diner in Anytown, USA. Joe Smith, the cook in my diner, was away from work for service in the Army National Guard for exactly one year, from 10/1/2016 until 9/30/2017. He applied for reemployment on 11/1/2017. After reading your Law Review 17126, I acknowledge that it seems clear that he meets the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

[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 only ten employees. My nephew is a lawyer, and he told me that if I keep the number of employees below 15 I am exempt from USERRA and other federal employment laws. What do you have to say about that?

A: Your nephew is right about other federal employment laws but wrong about the federal reemployment statute. The reemployment statute has never had an applicability threshold based on the size of the enterprise or the number of employees. You only need one employee to be an employer for purposes of USERRA.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as the long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's legislative history provides: "This chapter [USERRA] would apply, as does current law, to all employers regardless of the size of the employer or the number of employees. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992)."[3]

In the *Cole* case, Dr. Swint owned a ranch and employed one ranch hand, Mr. Cole. Mr. Cole joined the National Guard and took time off from his job for his initial active duty training (boot camp). Dr. Swint filled the position with another ranch-hand and refused to reemploy Mr. Cole upon his return from military training.

Dr. Swint argued that since he had only one employee he was a "casual employer" and not subject to the requirements of the reemployment statute. The 5th Circuit[4] forcefully rejected that assertion. If Congress had intended to exempt small employers, it would have written such an exemption into the text of the statute, as it has with other employment statutes, the court held. The lack of an express exemption for small employers means that they are subject to the reemployment statute.

Q: When Joe Smith left for his military duty in September 2016, I filled the cook position by hiring Mary Jones. While Smith is a reasonably competent cook, Jones is a superstar. Frequently, customers gush about the quality of the food, since Jones became the cook. That seldom happened when Smith was the cook. I only need one cook. I am most reluctant to reinstate Smith if that means firing Jones.

Is Smith necessarily entitled to reinstatement in the cook position?

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[3] House Committee Report, April 28, 1993, H.R. Rep. 103-65, Part 1. This committee report is reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted language can be found on page 686 of the 2017 edition of the *Manual.*

[4] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

A: Because Smith meets the five USERRA conditions, he is entitled to be reemployed "in the position of employment in which the person [Smith] *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."[5]

The position that Smith would have attained if he had remained continuously employed is not necessarily the position he left, but in this case (as in most cases) it seems most likely that if Smith had not been called to the colors he would have retained the cook position. If you reinstate Smith in a position other than the cook position, the alternative position must meet a two-part test:

a. Smith must be qualified for the position.
b. The position must be of like seniority, status, and pay to the cook position.

Q: What is status?

A: The VRRA 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*.[6]

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:

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[5] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

[6] *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).

> 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."[7]

Q: I have ten positions at the diner, and all ten positions are filled by employees who are doing a fine job. I do not need and cannot afford to establish an eleventh position. Am I required to reemploy Joe Smith even if that means that I must lay off another employee who is doing great work?

A: Yes. The lack of a present vacancy is not a defense to the employer's obligation to reemploy the returning service member in an appropriate position. If the right to reemployment were dependent upon the existence of a vacancy at the time of application for reemployment, USERRA would be essentially worthless.

I invite your attention to *Ryan v. Rush-Presbyterian-St. Luke's Medical Center.*[8] 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[9] 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:*[10]

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[7] 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 700 of the 2017 edition of the *Manual.*

[8] 15 F.3d 697 (7th Cir. 1994).

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

[10] 11 F.3d 160 (Fed. Cir. 1993).

> 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.[11]

USERRA's legislative history includes the following instructive paragraph:

> It is also not a sufficient excuse [for the employer not to reemploy the returning veteran in an appropriate position] 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 v. Halifax County School System,* 508 F. Supp. 966, 969 (E.D.N.C. 1981). *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).[12]

Q: I think that it is unreasonable and perhaps unconstitutional to require a small employer like me to fire a great employee to make room for a mediocre employee who voluntarily chose to join the Army. What do you say about that?

A: Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the

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[11] *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.

[12] 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 691-92 of the 2017 edition of the *Manual.*

early 20th Century) and by drafting young men into military service.[13] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[14]

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). No one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these three laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 17th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that decade and a half we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, Active Component and Reserve Component, have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

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[13] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

[14] *Arver v. United States,* 245 U.S. 366 (1918). The citation means that you can find this decision in Volume 245 of *United States Reports,* starting on page 366.

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 16 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, Active and Reserve, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, almost 45 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor. Our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that we never need to return to the draft. Maintaining the AVM requires that we provide incentives and minimize disincentives to serve among the young men and women who are qualified for military service.

I have written:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
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> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).

> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is a compelling government interest in the enforcement of USERRA.[15]

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren. You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

[15] Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.