

## LAW REVIEW 18015<sup>1</sup>

February 2018

### Enforcing USERRA against a State Government Employer— Good News from California

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[Update on Sam Wright](#)

1.1.1.7—USERRA applies to state and local governments

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***California Correctional Peace Officers Association v. Department of Corrections & Rehabilitation, 15 Cal. App. 5<sup>th</sup> 97, 2017 Cal. App. LEXIS 780 (California Court of Appeals, Third Appellate District, September 8, 2017).<sup>3</sup>***

#### Facts

In 2000, Sammie Gardner was on active duty in the Air Force and was nearing the end of his expected active duty period. He expected to leave active duty in the fall of 2001, and he applied

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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 1600 "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 1400 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).

<sup>3</sup> This is a recent decision of one of California's intermediate appellate courts, above the trial court and below the California Supreme Court.

to the California Department of Corrections & Rehabilitation (CDCR)<sup>4</sup> for an entry-level Corrections Officer (CO) position. He was selected for hiring and told to report for CO basic training in November 2001.

On 9/11/2001, the “date which will live in infamy” for our time, 19 terrorists hijacked four airliners and crashed them into three buildings and a field, killing almost 3,000 of our fellow Americans. The national emergency created by the terrorist attacks necessitated a “stop loss” order in the military. Like thousands of other service members, Gardner was required to remain on active duty past the date that he expected to leave. Under the stop loss order, Gardner remained on active duty until December 2002. The extension of his active duty caused Gardner to miss the California CO basic training class that convened in November 2001. He informed the CDCR that he would not be able to attend the November 2001 class because his Air Force active duty had been involuntarily extended.

When Gardner left active duty in December 2002, he promptly notified the CDCR that he was off active duty and available to start his CDCR employment. CDCR informed him that he was not an employee because he had not reported to the CO basic training course in November 2001 as ordered and that he could not be hired in December 2002 because a “hiring freeze” was in effect for fiscal reasons.<sup>5</sup>

Because of the hiring freeze, and because he was not already a CO, according to CDCR, Gardner missed the November 2003 CO basic training course. He was finally hired by CDCR as an entry-level CO in 2005.

### **Alternative legal theories**

The California Correctional Peace Officers Association (CCPOA) is the union that represents Gardner and other CDCR COs. CCPOA filed a grievance on behalf of Gardner, making two alternative arguments:

- a. If CDCR withdrew Gardner’s job offer because his active duty had been unexpectedly extended by the national emergency created by the terrorist attacks of 9/11/2001, or if CDCR discriminated against Gardner in initial hiring because of the unexpected extension of his active duty, CDCR violated section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>6</sup> as well as California state law and the Memorandum of Understanding (MOU) between CCPOA and CDCR.

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<sup>4</sup> As I have explained in Law Review 09031 (September 2009), this is not the first time that CDCR has violated USERRA. In 2009, the United States Department of Justice (DOJ) sued CDCR for violating this law.

<sup>5</sup> As I explained in Law Review 15078 (September 2015), a state budget crisis does not excuse a state from its obligation to comply with USERRA.

<sup>6</sup> 38 U.S.C. 4311(a).

- b. If CDCR did not withdraw the job offer, Gardner was entitled to reemployment under USERRA in December 2002 when he left active duty and promptly reported his availability for work to CDCR.

Under either theory, Gardner was entitled to a CDCR start date, for seniority purposes, of November 2001, when he would have begun his CDCR career but for the stop loss order necessitated by the terrorist attacks of 9/11/2001. The difference between a 2001 hire date and a 2005 hire date is important to Gardner because it affects his hourly rate of pay, his eligibility for promotion within CDCR, his protection from a layoff if at some point there is a Reduction in Force (RIF) at CDCR, and his date of eligibility to retire at the end of his CDCR career. I believe that both theories were valid.

### **Discrimination**

Section 4311(a) of USERRA provides:

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>7</sup>

Gardner had an *obligation* to make himself available to remain on active duty past his expected release date, if the Air Force found it necessary to retain him on active duty. Because of the national emergency created by the terrorist attacks of 9/11/2001, the Air Force found it necessary to invoke Gardner's obligation and to retain him on active duty until December 2002. Gardner was denied *initial employment* because of his obligation to perform uniformed service. The denial violated section 4311(a).

The facts relating to Sammie Gardner in this case are very similar to the facts relating to Thomas McLain in *McLain v. City of Somerville*.<sup>8</sup> Like Gardner, McLain was on active duty in the armed forces and expecting to be released from active duty in the fall of 2001. Like Gardner, his active duty obligation was extended because of the terrorist attacks of 9/11/2001. He had been offered a job as a rookie police officer, and he had accepted the offer. He was unable to report to the police academy as scheduled because of the extension of his active duty.

The City of Somerville expected McLain to begin his employment on 10/1/2001, by reporting for a police academy class that began on that date. When McLain notified the City that he

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<sup>7</sup> 38 U.S.C. 4311(a) (emphasis supplied).

<sup>8</sup> 424 F. Supp. 2d 329 (D. Mass. 2006). I discuss *McLain* in detail in Law Review 07046 (September 2007).

would not be able to report on that date because his active duty had been extended after and because of the terrorist attacks, the City withdrew the offer of employment. McLain sued, and Judge Reginald C. Lindsay ruled in his favor, holding:

McLain's basic argument is that Somerville violated his rights under USERRA when it failed to hire him because his military service prevented him from being available on the day Somerville wanted him to start work. The parties do not dispute that McLain would have been hired had he been available for the training academy on October 1, 2001, and that he was not available on that date because of his active service in the Army. The sole question is whether USERRA prevents discrimination in initial hiring on the basis of unavailability due to active service in the military. This appears to be a case of first impression.

The starting point for the legal analysis, of course, is the language of USERRA itself: "if statutory language is plain, permitting only one construction, there is no occasion to seek out congressional intent by reference to legislative history or other extrinsic aids." *Lapine v. Town of Wellesley*, 304 F.3d 90, 96 (1st Cir. 2002). The relevant provision of USERRA is section 4311(a), which provides:

"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." 38 U.S.C. section 4311(a). USERRA defines an "employer" as "any person, institution, organization, or other entity that pays salary or wages for work performed," 38 U.S.C. section 4303(4)(A); defines "uniformed services" to include the Army, 38 U.S.C. section 4303(16); and defines "service in the uniformed services" as "the performance of duty on a voluntary or involuntary basis in a uniformed service . . . including active duty," 38 U.S.C. section 4303(13).

By USERRA's plain terms, then, Somerville's failure to hire McLain violated the statute: Somerville, a covered employer, denied initial employment to McLain, a member of the Army, because of McLain's obligation to perform service in that uniformed service in the fall of 2001.<sup>9</sup>

In the present case, the California court cited *McLain* with approval.

## Reemployment

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<sup>9</sup> *McLain*, 424 F. Supp. 2d at 333.

A person has the right to reemployment at the pre-service employer if he or she meets the five USERRA conditions:

- a. Left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” 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.<sup>10</sup>
- e. After release from the period of service, has made a timely application for reemployment.<sup>11</sup>

A person who meets these five conditions is entitled to prompt reinstatement in the job that he or she would have attained if he or she had remained continuously employed by the civilian employer, or another job (for which he or she is qualified) that is of like seniority, status, and pay.<sup>12</sup> Upon reemployment, the person is entitled to be treated as if he or she had been continuously employed, for seniority and pension purposes in the civilian job.<sup>13</sup>

When an employer (federal, state, local, or private sector) makes an unambiguous employment offer with a specific report date to an individual, and when the individual unambiguously accepts the employment offer, an employer-employee relationship is created as of the date of the acceptance of the offer, even if the agreed-upon report date is some days, weeks, or perhaps months away. If the individual is a Reserve Component (RC) member, and if he or she is called to the colors between the agreement date and the report date, he or she will have the right to reemployment under USERRA.<sup>14</sup>

The situation faced by Thomas McLain and Sammie Gardner was essentially the same as the situation I addressed in Law Review 36. Both McLain and Gardner accepted job offers with start dates after the dates that they reasonably expected to leave active duty. In McLain’s case and

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<sup>10</sup> Disqualifying bad discharges include bad conduct discharges and dishonorable discharges (awarded by court martial for serious offenses) and other-than-honorable administrative discharges. 38 U.S.C. 4304.

<sup>11</sup> After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>12</sup> 38 U.S.C. 4313(a)(2)(A).

<sup>13</sup> 38 U.S.C. 4316(a), 4318.

<sup>14</sup> See Law Review 36 (December 2001). Of course, the individual will need to meet the five USERRA conditions, including giving prior notice to the employer that he or she will not be reporting on the agreed-upon report date because of the unexpected call to active duty, release from active duty without having received a disqualifying bad discharge and without having exceeded the five-year limit, and timely application for reemployment after the eventual release from active duty.

in Gardner's case, the expected date of release from active duty was unexpectedly extended because of circumstances that could not have been anticipated (the 9/11/2001 terrorist attacks). Both McLain and Gardner notified their employers, before the agreed-upon report dates, that they would not be able to report as agreed upon because of the unanticipated extension of their active duty obligations. Both were released from active duty some months later and made timely applications for reemployment. Both were entitled to reemployment under USERRA.

### **CCPOA acted to enforce Gardner's USERRA rights.**

In August 2011, CCPOA initiated a grievance on behalf of Gardner. In the grievance, CCPOA cited USERRA, section 19775.18 of the California Government Code, and two provisions of the Memorandum of Understanding (MOU) between CCPOA and CDCR.<sup>15</sup> CCPOA contended that Gardner was entitled to a CDCR employment start date of November 2001.

In the grievance, CCPOA sought remuneration for all merit salary increases that Gardner would have received if his active duty period had not been extended in 2001, recalculation of Gardner's time worked (including overtime), credit for all leave credit for Gardner as if his active duty had not been extended, recalculation of Gardner's seniority status, recalculation of Gardner's CDCR retirement to reflect a November 2001 start date, and other remedies "deemed just, proper, and mutually agreed upon."

The parties (CDCR and CCPOA) mutually agreed to use the grievance procedure to resolve this dispute. That grievance procedure has four steps. The first two are at the specific institution (prison) where the individual employee is or was employed. The third step is an appeal to CDCR Labor Relations at the CDCR headquarters. The fourth step is an appeal to the California Department of Human Relations (Cal HR).

Cal HR awarded CCPOA essentially all the relief that it sought on behalf of Gardner. In late October or early November of 2012, CDCR sent Gardner a check in the amount of \$15,000 as a "good faith payment" but also notified him that he might have to repay the money because CDCR questioned Cal HR's authority to order the relief that it ordered. In a series of communications between March and May of 2013, CDCR informed CCPOA that it would not implement the Cal HR decision.

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<sup>15</sup> Under section 4302 of USERRA, 38 U.S.C. 4302, this federal law is a floor and not a ceiling on the employment and reemployment rights of those who are serving or have served our country in uniform. USERRA supersedes and overrides a state law or an agreement between an employer and a union if that state law or agreement purports to limit USERRA rights or to impose an additional prerequisite on the exercise of USERRA rights. USERRA does not supersede or override an agreement or state law that gives the service member or veteran greater or additional rights. Please see Law Review 18004 (January 2018).

CCPOA then petitioned the Superior Court for a writ of mandate to enforce the Cal HR decision. CDCR then contended for the first time that the Cal HR decision was invalid because California's State Personnel Board (SPB) had exclusive jurisdiction to decide a dispute of this nature. The Superior Court Judge agreed with CDCR and declined to issue the writ of mandate.

CCPOA appealed to California's intermediate appellate court, and this decision resulted. In a scholarly decision, the three-judge panel of the appellate court firmly rejected CDCR's objections to the Cal HR decision and held: "The judgment is reversed and the matter remanded to the trial court with directions to issue a writ of mandate ordering Corrections to comply with the Department's decision. The Association [CCPOA] shall recover its costs on appeal."

### **Congratulations**

I congratulate CCPOA and CCPOA staff attorneys Daniel M. Lindsay and Charlotte Martinez and CCPOA's retained outside attorneys Douglas G. Benedon and Wendy S. Albers for their imaginative, diligent, and successful representation of Sammie Gardner. They have succeeded in creating a new way to deal with the difficult problem of enforcing USERRA against a state government employer.<sup>16</sup>

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<sup>16</sup> In Law Review 16070 (July 2016) and Law Review 17115 (December 2017), I discuss in detail the enormous problems involved in enforcing USERRA against a state government employer because of state sovereign immunity and the 11<sup>th</sup> Amendment of the United States Constitution.