

LAW REVIEW 18024¹

March 2018

Working as an Air Reserve Technician Does Not Amount to “Service in the Uniformed Services” for USERRA Purposes

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

[\(Update on Sam Wright\)](#)

1.1.2.3—USERRA applies to employees who have been laid off

1.3.1.1—Left job for service and gave prior notice

1.7—USERRA regulations

Q: I am a Colonel in the Air Force Reserve and I recently joined the Reserve Officers Association (ROA) after a colleague told me about your “Law Review” articles on the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am trying to figure out how USERRA applies to my situation.

While in college, I participated in the Air Force Reserve Officers Training Corps (ROTC). When I graduated from college in May 1990, I was commissioned a Second Lieutenant in the Air Force. I served on full-time active duty for the next eleven years, until May 2001, when I was released from active duty with eleven years of honorable service.

¹ I invite the reader’s attention to 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.

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.

After I left active duty, I quickly found a civilian job as a rookie First Officer (co-pilot) at a large airline—let's call it Very Big Air Line or VBAL. I had only been flying for VBAL for about a month when the terrorist attacks of 9/11/2001 happened. In the aftermath of the terrorist attacks, VBAL and most other airlines reduced the number of scheduled flights. With fewer scheduled flights, there was less need for pilots, and many pilots were “furloughed.”³

Like most major airlines, VBAL is unionized. In a unionized airline, the most junior pilots are the first to be furloughed and the last to be recalled from furlough. I was furloughed by the airline in the fall of 2001, just weeks after the 9/11 terrorist attacks.

When VBAL furloughed me, I had a toddler child and a second child on the way. Not knowing when or even if I would be recalled by the airline, I sought out opportunities to return to active duty in the Air Force. I was unable to find a suitable Active Guard and Reserve (AGR) tour or other active duty opportunity. I was offered the opportunity to become an Air Reserve Technician (ART), and I availed myself of that opportunity. I have been an ART since January 2002.

In 2008, VBAL finally recalled me from furlough, by sending me a certified letter. I replied promptly, advising that I was serving in the Air Force and was not immediately available to return to work. The airline then put me in a “military leave” status, and I have been in that status ever since. Each year, in January, the airline contacts me to ask if my military status has changed, and each year I confirm that I am still serving and that I want the airline to keep me on the “military leave” list. Finally, in 2018, I am ready to retire from the Air Force Reserve and from my ART position. Does USERRA give me the right to return to VBAL as a pilot when I retire later this year?

Answer, bottom line up front:

No, you do not have the right to reemployment at VBAL because you do not meet the five USERRA conditions for reemployment. You clearly fail to meet the first condition, so we need not address the other four.

Explanation:

As I have explained in Law Review 15116 (December 2015) and many other articles, a service member or veteran must meet five simple conditions to have the right to reemployment under USERRA:

³ In the airline industry, this situation is called a “furlough.” In most other industries it is called a “layoff.” The idea is that I was removed from the payroll, but with an expectation that I would be or at least could be recalled back to work when business conditions improved.

- a. Must have left a civilian position of employment (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.⁴
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.⁵
- e. Must have made a timely application for reemployment after release from the period of service.⁶

When you were furloughed (laid off) by VBAL, you still had an employer-employee relationship with the airline. Section 4331 of USERRA⁷ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, DOL published proposed regulations in the *Federal Register*, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* in December 2005. The regulations were incorporated into the Code of Federal Regulations (C.F.R.), title 20, part 1002. One section of the regulations is right on point to this issue:

What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?

- (a)** *If an employee is laid off with recall rights, on strike, or on a leave of absence, he or she is an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service.* Similar principles apply if the employee is on strike or on a leave of absence from work when he or she begins a period of service in the uniformed services.
- (b)** *If the employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an employee for purposes of the Act. Therefore, if the employee is otherwise*

⁴ As I have explained in Law Review 16043 (May 2016) and other articles, there are nine exemptions—kinds of service that do not count toward exhausting your five-year limit.

⁵ Under section 4304 of USERRA, 38 U.S.C. 4304, you do not have the right to reemployment if you have received a punitive discharge (dismissal, dishonorable discharge, or bad conduct discharge) by court martial, or if you have received an “other than honorable” administrative discharge, or if you have been “dropped from the rolls” of your uniformed service.

⁶ After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁷ 38 U.S.C. 4331.

eligible, he or she is entitled to reemployment following the conclusion of the period of service even if he or she did not respond to the recall notice.

(c) If the employee is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee. Reemployment rights under USERRA cannot put the employee in a better position than if he or she had remained in the civilian employment position.⁸

If you had left the VBAL furlough status to go on voluntary or involuntary active duty (like a mobilization or an AGR tour) in January 2002, and if you had given the airline prior notice, and if you had met the other USERRA conditions, you would have had reemployment rights at VBAL. If the airline had recalled you to work while you were on active duty, you would have had the right to reemployment in an active job when you left active duty. If the airline had not yet recalled you to work, you would at least have had the right to reinstatement onto the furlough list, with the possibility of being called back to active work.

You do not have reemployment rights at VBAL because you did not leave VBAL employment (the furlough status) *to perform uniformed service*. *An ART position is a civilian job*. USERRA does not accord the right to reemployment to a person who leaves a civilian job for another civilian job.

Yes, I recognize that, as an ART, you are required to maintain your membership in the Air Force Reserve and in one of the units that you support. Yes, I recognize that you participate with your unit in a military capacity during drill weekends and annual training and that you could be mobilized with your unit. Yes, I recognize that during your civilian employment as an ART you often wear your military uniform and observe military courtesies. Nonetheless, as an ART you are a civilian employee of the Air Force, and when you started your ART job in January 2002 you were not leaving a civilian job (at VBAL) to perform uniformed service.

Q: My good friend Mary Jones is an ART like me. She told me that USERRA applies to ARTs and that she was protected by USERRA when she left her job to go on active duty. What gives?

A: An ART position is a civilian job. If Mary left her civilian job, as an ART, to go on active duty, and if she met the five USERRA conditions set forth above, she had the right to reemployment as an ART. Her situation is distinguishable from yours.

⁸ 20 C.F.R. 1002.42 (bold question in original, emphasis by italics supplied).