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Don't Try To Work at your Civilian Job while on Active Duty—Part 2

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

1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employment

1.1.3.2—USERRA applies to regular military service

1.3.1.3—Timely application for reemployment

In Law Review 106 (December 2003), I advised against working at your civilian job while you are on active duty. Indeed, the title of the article is “Don’t Try To Work at your Civilian Job While on Active Duty.” Because I continue to receive inquiries about this topic, and because almost 15 years have gone by since I last addressed this topic in writing, I will reiterate what I wrote in 2003.

The basic idea behind the Uniformed Services Employment and Reemployment Rights Act (USERRA) is that you leave a job for voluntary or involuntary uniformed service and then you return to that job when you complete the period of service. You only confuse things when you work part-time at the civilian job during the period of 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.

If your active duty assignment is in the same metropolitan area as your civilian job, it may be geographically feasible to get to your civilian worksite a few hours each week, but you must have the permission of your military commander to moonlight in this way. Your commander may give you such permission, but with the clear understanding that your military duties come first. You will not be permitted to say: "I cannot stay late tonight at the military base because I need to get to my civilian job."

If you are to work part-time at your civilian job, your civilian employer will probably schedule you to work at certain times. The first time you are unable to attend a scheduled work period because of conflicting military duties, the employer could fire you for absence from work. Does USERRA protect you in these circumstances? Probably not.

If you are on active duty, voluntarily or involuntarily, you should be devoting your full time and attention to your military duties. The whole point of USERRA, as well as the Servicemembers Civil Relief Act (SCRA), is to remove civilian legal distractions to make it possible for you to perform your military duties well.

I invite the reader's attention to my favorite novel, *The Caine Mutiny*, by Herman Wouk.³ The first edition of the novel came out a few days before I was born, and the movie came out when I was three, in 1954. In the movie, LCDR Queeg (Humphrey Bogart) told LT Keefer (Fred MacMurray): "War is a 24-hour job. There will be no novel-writing on board USS Caine."

I also invite the reader's attention to *Drake v. Tuscan, Inc.*⁴ Charles W. Drake was an enlisted member of the United States Air Force, on full-time regular active duty and assigned to an Air Force base in Arizona. On March 1, 2008, he began a part-time "moonlighting" job as a doorman for a "gentlemen's club" owned and operated by Tuscan, Inc. The Air Force ordered Drake to deploy to Qatar for eight months, from June 2008 until February 2009. At the end of this deployment, he returned to the base in Arizona, still on active duty. He gave the club prior notice that he would need to leave the job for several months because of his deployment, and after he returned to Arizona he promptly applied for reinstatement. Tuscan refused to reinstate him, and this lawsuit resulted.

As I have described in Law Review 15116 (December 2015) and many other articles, an individual must meet five simple conditions to have the right to reemployment under USERRA:

³ Herman Wouk served in the Navy in World War II. He is still alive and is approaching his 103rd birthday.

⁴ 2010 U.S. Dist. LEXIS 2288 (D. Arizona January 12, 2010). I discuss this case in detail in Law Review 13004 (January 2013).

- a. Must have left a civilian job (federal, state, local, or private sector) to perform uniformed service.
- 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.⁵
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. Must have made a timely application for reemployment *after release from the period of service.*

Yes, USERRA applies to part-time as well as full-time civilian employment.⁶ Yes, USERRA applies to regular military service, as well as service in the National Guard or Reserve.⁷ Nonetheless, Drake did not have the right to reemployment at the club when he returned from his eight-month deployment to Qatar, because he failed to meet the last two of the five USERRA conditions. He had not been released from the period of service without a disqualifying bad discharge, because he had not been released from his period of service at all—he was still on active duty. And Drake did not make a timely application for reemployment *after release from the period of service.*

After Drake filed suit against Tuscan in the United States District Court for the District of Arizona, Tuscan filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To get a case dismissed under that rule, a defendant must show that the plaintiff is not entitled to any relief that the court can award *even if all the plaintiff's factual assertions are correct.* Judge David C. Bury granted the defendant's motion to dismiss on January 12, 2010. In his opinion, he explained his reasoning in granting the motion to dismiss. I believe that Judge Bury's reasoning is sound and correct.

Drake did not appeal to the Court of Appeals, and this case has not been cited in any later case, but it is cited and discussed in our Law Review 13004 (January 2013) and in *The USERRA Manual*, by Kathryn Piscitelli and Edward Still.⁸

Q: I don't see the problem. I have the explicit permission of my military commander, in writing, to moonlight at my civilian job. I need the money, and I also want to stay on good

⁵ As I have described in detail in Law Review 16043 (May 2016) and many other articles, there are nine exemptions to the five-year limit—that is, there are nine kinds of service that do not count toward exhausting an individual's limit.

⁶ Please see Law Review 12054 (May 2012).

⁷ Please see Law Review 0719 (May 2007).

⁸ As I explained in Law Review 17068 (June 2017), *The USERRA Manual* is the definitive treatise on USERRA.

terms with my civilian employer by coming in to work a few times per month, when I am most needed. Why is this a problem?

A: Your commander's written permission means that you will not be court-martialed by the Air Force for moonlighting without permission. The permission from your military commander is not relevant to your rights vis-à-vis your civilian employer. I strongly stand by the advice I gave almost 15 years ago: *Do not work at your pre-service civilian job, or any civilian job, while you are on active duty.*