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Returning Service Member Who Is Medically Disqualified from Flying Airliners Is Entitled To Return to Payroll and Use Accrued Sick Leave

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(Update on Sam Wright)

1.2—USERRA forbids discrimination
1.3.2.9—Accommodations for disabled veterans
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1.8—Relationship between USERRA and other laws/policies

Q: I am the Personnel Director of a major airline (let's call it Very Big Air Line or VBAL). We have 50,000 employees, including 7,500 pilots. A substantial minority of our pilots are active current participants in the National Guard or Reserve. A smaller but still significant percentage of our flight attendants, maintenance personnel, and other employees also actively participate in the Guard or Reserve. Accommodating military-related absences from work by these employees has been a significant challenge for VBAL and for me personally, as the Personnel Director.

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[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.

The VBAL Chief Pilot and other officials have complained vociferously about the burden placed on our airline by employees who serve in the National Guard or Reserve, and I confess that at times I have joined in those complaints. I have read and reread your Law Review 17055 (June 2017), and I must admit that you eloquently make the point that the burdens imposed on civilian employers and supervisors are very small as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform and by their families.

I have read and utilized many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have found those articles most helpful in understanding our company's obligations to its employees who also serve in the Guard or Reserve. We now have a situation that I do not think that you have specifically addressed in one of your articles.

We have a pilot (let's call him Joe Smith) who is a Colonel in the Air Force Reserve and who recently returned from three years of active military duty, from March 2015 to March 2018. Joe meets the five USERRA conditions for reemployment.[3] He left his VBAL job in March 2015 to go on active duty, and he gave us prior notice, orally and in writing. He has not exceeded the cumulative five-year limit on the duration of his period or periods of uniformed service with respect to his employer relationship with VBAL.[4] He served honorably and did not receive a disqualifying bad discharge from the Air Force. After release from active duty last month, he made a timely application for reemployment at VBAL.

Near the end of his three-year active duty period, Joe developed a medical condition that disqualifies him from flying, either for the Air Force or for our airline. Under rules promulgated and enforced by the Federal Aviation Administration (FAA), an airline pilot needs a medical certificate, and Joe's medical condition disqualifies him from flying, at least temporarily. It is likely but not certain that Joe's condition will improve and that he will be able to get an FAA medical certificate within six to eight months.

Joe has worked for our airline for many years, and he has almost never missed work for health reasons. As a result, he has 750 hours of sick leave in the bank. Joe has asked us (the airline) to reinstate him to the payroll and to put him on sick leave, but we have denied his request since it is contrary to our policy. Joe insists that our policy is contrary to USERRA.

Under the collective bargaining agreement (CBA) between VBAL and the union that represents VBAL pilots, a pilot is guaranteed payment for 75 hours of flying time per month.

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[3] Please see Law Review 15116 (December 2015) for a detailed discussion of the five conditions.

[4] Please see Law Review 16043 (May 2016) concerning the five-year limit and the nine exemptions.

If the pilot works more than 75 hours in a month, he or she is paid for the hours worked. If he or she works less than 75 hours, because work was not available to the pilot, the airline pays the pilot for the difference.

Joe has asked to go back on the payroll and to remain on the payroll, in a sick leave status, until he has recovered sufficiently to regain his FAA medical certificate or until he has exhausted his 750 hours of sick leave, whichever comes first. At 75 hours per month, Joe could remain on sick leave for up to ten months.

Do you think that USERRA gives Joe the right to insist that we put him back on the payroll so that he can use his 750 hours of sick leave?

A: Yes, I think that denying Joe the opportunity to go back on the payroll in a sick leave status violates section 4311 of USERRA, which provides:

> **(a)** 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.
> **(b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
> **(c)** An employer shall be considered to have engaged in actions prohibited--
> **(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
> **(2)** under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

> **(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[5]

Section 4303 of USERRA[6] defines 16 terms used in this law, including the term "benefit of employment."[7] That term is broadly defined, and the right to use accrued sick leave when one has a medical condition that precludes one from working is a "benefit of employment" for purposes of section 4311 of USERRA. If you (VBAL) deny Joe the opportunity to use his accrued sick leave in this situation, because he has recently been away from work for military service, you are violating section 4311.

Let us consider a comparator—another VBAL pilot whose situation is similar, except for the military service. Like Joe Smith, Mary Jones has been a VBAL pilot for many years and has seldom taken a day off for health reasons. Like Joe Smith, Mary Jones has 750 hours of sick leave in the bank in March 2018, when she developed a medical condition that disqualified her from flying, at least temporarily. VBAL will not question Mary's right to use her accrued sick leave in this situation—this is what sick leave is for.

How is Mary's situation different from Joe's? Only in the sense that Joe was recently away from work for military service, prior to the onset of the illness, while Mary was not. VBAL's sick leave policy, as applied to Joe Smith, is a facial violation of section 4311.

As I have explained in Law Review 17035 (April 2017), Joe has the right to insist that VBAL reemploy him promptly *even though he cannot currently fly airliners, under FAA rules.*[8] The airline is required to reemploy Joe in a non-flying position that is equivalent in seniority, status, and pay to the flying position that he left and would have retained, but for his 2015-18 military service. It may be necessary for VBAL to displace another non-flying employee to find Joe a position that is equivalent to his former flying position, or as close as possible consistent with the circumstances of Joe's case.

By requesting reinstatement on the payroll and placement on the sick leave list, Joe has done the airline a big favor. Accommodating Joe's request to use his sick leave is much less difficult for the airline than giving Joe his rights under section 4313(a) of USERRA.[9]

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[5] 38 U.S.C. 4311 (emphasis supplied).
[6] 38 U.S.C. 4303.
[7] 38 U.S.C. 4303(2).
[8] The FAA rules preclude Joe from flying airliners, until he regains his medical certificate. The FAA rules do not preclude VBAL from reemploying Joe in some other capacity.
[9] 38 U.S.C. 4313(a).