

No Reemployment for Army Deserter

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1.8—Relationship between USERRA and other laws/policies

***Adams v. Penn Line Services*, 620 F. Supp. 2d 835 (N.D. Ohio 2009).**³

Shawn Adams was hired by Penn Line Services (PLS), as a foreman, in January 2005. He was a member of the Army Reserve, but PLS was apparently unaware of his military affiliation until

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 (VRRRA—the 1940 version of the federal reemployment statute) for 36 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 VRRRA 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 VRRRA 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.

³ This is a decision by Judge Jack Zouhary of the United States District Court for the Northern District of Ohio. The citation means that you can find this decision in Volume 620 of *Federal Supplement Second Series* starting on page 835. This decision was not appealed to the United States Court of Appeals for the 6th Circuit, the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee, and the deadline for filing such an appeal expired years ago. This case is over and final. The facts in this article come directly from the court decision. I have no personal knowledge of the facts.

10/3/2005, when Adams informed the employer that he had been called to active duty by the Army. Adams did not specify his last day of work before his report date for active duty.

On 10/4/2005, Adams showed up for work at PLS, but he left early without telling anyone. He did not show up for work on 10/5/2005, and the company fired him on that date.

During the summer of 2006, Adams returned home to Ohio, still on active duty but on leave. He failed to report back to the Army at the end of his approved leave period, and the Army declared him a deserter in September 2006.

That same month (September 2006), Adams contacted PLS to request his job back. The company was not aware at the time of Adams' deserter status. The company told him that he could report back to work 10/3/2006, provided he showed up for a drug test on 9/29/2006 and passed the test. Adams showed up for the drug test as scheduled and passed the test, and the company expected him to report back to work on 10/3/2006.

Adams failed to show up for work on 10/3/2006, or 10/4 or 10/5. On 10/5, the company fired him a second time. The company did not learn of Adams' deserter status until years later, in the litigation of this case.

Adams did not show up for work on 10/3 or the next two days thereafter because on 9/29/2006, after he took and passed the company drug test, Adams was arrested by local law enforcement officers for forgery. The company learned about the arrest only much later, in the litigation of this lawsuit.

Adams was incarcerated pending his sentencing on 10/23/2006, when he was sentenced to a term of confinement in the Ohio State Penitentiary. The Army learned of his incarceration and asked the Ohio authorities to extradite him to the Army upon completion of his state sentence. In February of 2007, Adams was released from the State Penitentiary and transferred to the Army at Fort Knox. He requested a discharge in lieu of court martial for desertion or unauthorized absence. In May 2007 the Army discharged Adams with an "other than honorable" administrative discharge. He again sought reemployment at PLS, claiming (falsely) that he had been honorably discharged.

As I have explained in Law Review 18039 (the immediately preceding article in this series), a person must meet five conditions to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). One of the conditions is that the person have been released from service without having received one of four enumerated bad discharges that disqualify a person from reemployment under section 4304 of USERRA.⁴ One of

⁴ 38 U.S.C. 4304.

the disqualifying bad discharges is “a separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.”⁵ The “other than honorable” discharge that Adams received was the kind of disqualifying bad discharge that is referred to in section 4304(2) of USERRA.⁶

PLS failed to reemploy Adams when he applied in May 2007, because there were no vacancies at the time.⁷ In July 2007, Adams filed an affidavit with the company in which he claimed (under oath) that he had served honorably in the Army and had been released from active duty in August 2006. Of course, that was a knowing lie. Adams filed this lawsuit in November 2007, represented by attorney Kolin Rice.

In June 2008, Adams testified under oath at a deposition demanded by the defendant and wrongly claimed that he had received an honorable discharge from the Army. In July 2008, Adams made the same untruthful claim in a written response to a discovery request.

In his opinion, Judge Zouhary noted: “In addition to all of the above, Adams’ counsel objected to Penn Line’s attempts to obtain verification of Adams’ discharge status. Thus, Adams’ counsel not only failed to verify his client’s status, he took steps to block its disclosure.”⁸

In August 2008, Judge Zouhary conducted a settlement conference to resolve this case. Adams directly represented to the court that he had been honorably discharged by the Army. The conference resulted in a provisional resolution of the case. PLS agreed to reinstate Adams upon proof that Adams had received an honorable discharge.

To expedite verification, Judge Zouhary subpoenaed the Department of the Army (DA) for conclusive documentation of Adams’ discharge status. DA responded to the subpoena in September 2008, and the documentation that the Army supplied showed that Adams had received an “other than honorable” administrative discharge.

PLS then sought sanctions against Adams and his attorney for wasting the company’s time and costing the company money by bringing and maintaining this lawsuit in bad faith, all the while knowing that Adams was not entitled to reemployment because he had received an “other than honorable” administrative discharge. Citing Rule 11 of the Federal Rules of Civil Procedure as well as the inherent power of a federal district judge to punish misconduct in a court

⁵ 38 U.S.C. 4304(2). The “Secretary concerned” is the Service Secretary—in this case the Secretary of the Army. See 10 U.S.C. 101(a)(9)(A).

⁶ *Id.*

⁷ If Adams had met the USERRA conditions, the company would have been required to reemploy him even if that meant displacing another employee. See *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993).

⁸ *Adams*, 620 F. Supp. 2d at 838.

proceeding, Judge Zouhary ordered Adams and Rice, jointly and severally,⁹ to pay \$3,729 to PLS.

Section 4323(h)(1) of USERRA provides: “No fees or court costs may be charged or taxed against any person claiming rights under this chapter.”¹⁰ I think that ordering Adams to pay \$3729 to PLS was inconsistent with this provision. Judge Zouhary did not mention section 4323(h)(1) in his decision. He was probably unaware of it because attorney Rice did not bring this provision to his attention.

⁹ “Jointly and severally” means that each of them is responsible for the full amount. I do not know for certain, but I suspect that Rice (the attorney) paid the full amount to retain his good standing as an attorney in that court.

¹⁰ 38 U.S.C. 4323(h)(1). Please see Law Review 10082 (by Thomas G. Jarrard, Esq.) for a detailed discussion of this provision.