LAW REVIEW 18045[1]
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Jones v. Marriott Revisited

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.4—USERRA enforcement

Q: I am an attorney, practicing labor and employment law on the plaintiff's (employee's) side. I have recently undertaken to represent a client with a case under the Uniformed Services Employment and Reemployment Rights Act (USERRA). In preparing this case, I found your excellent "Law Review" articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. Your articles have been immensely helpful to me in my case preparation and research.

I am particularly interested in your Law Review 13032 (February 2013), about the case of *Jones v. Marriott Hotel Services, Inc.*[3]

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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 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 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.

[3] Case No. C 12000587WHA (Northern District of California.

Like Captain Jones in that case, my client held a civilian job for a major company and left the job when called to active duty. When he left active duty, he clearly met the five USERRA conditions for reemployment.[4] After he was unlawfully denied reemployment, he mitigated his damages by returning to active duty for two years. The company has argued, and the judge seems to agree (at least for the purposes of settlement negotiations) that my client is not entitled to any substantial back pay because the amount of money that my client received from the Army for these two years of active duty (after he was denied reemployment) is substantially greater than the amount he would have earned at the company during that two-year period.

My client is a Major in the Army, and his military salary is greater than the salary that he received from his pre-service civilian employer, even before military benefits and allowances (imminent danger pay, basic allowance for quarters, military health care for my client and his family, etc.) are considered. But while on active duty my client routinely works 60, 80, or even 100 hours per week. At his civilian job, he works straight 40-hour weeks and almost never is asked to work overtime.

Moreover, of the extra two years of active duty, after he was unlawfully denied reemployment, my client spent one year in Afghanistan. During that year of deployment outside our country, he faced enormous risks of loss of life or limb—but fortunately he returned home unscathed.

In Law Review 13032, you argued that only part of Captain Jones' salary and benefits from the Marine Corps should be deducted from his back pay from the civilian employer (Marriott Hotel Services, Inc.) because while he was on active duty to mitigate his damages he worked much harder and longer and faced enormously greater physical risks than he would have faced in the civilian job if he had been properly reemployed when he first applied. I want to make a similar argument in my client's case. How did the *Jones* case turn out? Are you aware of more recent cases where this issue has arisen?

A: Shortly after my Law Review 13032 was published in February 2013, the *Jones* case settled. I did not represent Captain Jones, and I do not know the terms of the settlement. In cases of this nature, the settlement terms are often kept confidential under a non-disclosure agreement that the defendant insists upon as a condition of payment.

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[4] He left his job to perform uniformed service, and he gave the employer prior notice. His cumulative periods of uniformed service related to his employer relationship with that company did not exceed five years, especially when the exempt periods were excluded from the computation. See Law Review 16043 (May 2016). He served honorably and did not receive a disqualifying bad discharge from the Army. After he was released from active duty, he made a timely application for reemployment well within the 90-day deadline under section 4312(e)(1)(D) of USERRA, 38 U.S.C. 4312(e)(1)(D).

I am not aware of other cases involving this specific issue, except for one case in the Western District of New York where the issue came up and the case settled with a non-disclosure agreement. If your case results in a favorable published court decision, please let me know and I will address your case in a new "Law Review" article.

I strongly adhere to the position I took in Law Review 13032 more than five years ago. In comparing what the returning veteran earned in his or her mitigating employment with what he or she would have earned in the civilian job if the employer had obeyed the law, only an apples-to-apples comparison should be made. Comparing active duty earnings with civilian earnings is inherently unfair and unrealistic, because military service is fundamentally different from civilian employment.

I think that it is unconscionable that in your client's case and so many other cases civilian employers flout USERRA because they think that they can get away with it. As we celebrate Memorial Day, let us remember that were it not for the sacrifices of military personnel, from the American Revolution to the Global War on Terrorism, none of us would enjoy the blessings of liberty.

In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

> It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.[5]

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20th Century) and by drafting young men into military service.[6] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[7]

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). No one is required to serve in our country's military, but someone

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[5] Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.
[6] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).
[7] *Arver v. United States,* 245 U.S. 366 (1918). The citation means that you can find this decision in Volume 245 of *United States Reports,* starting on page 366.

must defend this country. When I hear folks complain about the "burdens" imposed by laws like USERRA, I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 17th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that decade and a half we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, AC and RC, have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 17 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 45 years ago, Congress abolished the draft and established the All-Volunteer Military (AVM). The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor. Our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that we never need to return to the draft. Maintaining the AVM requires that we provide incentives and minimize disincentives to serve among the young men and women who are qualified for military service.

I have written:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
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> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).
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> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is a compelling government interest in the enforcement of USERRA.[8]

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the

[8] Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.

“burdens” imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation’s need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation’s employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren. You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA. It should not be necessary to file a lawsuit to get an employer to comply with this much-needed law.