

LAW REVIEW 18052¹

June 2018

(Updated October 2019)

A Federal Agency Cannot Make You Quit the Reserves—Part 2

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Baker v. Department of Homeland Security, 2009 MSPB 83 (Merit Systems Protection Board May 18, 2009).

Q: I am a Captain in the Army Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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.

On the civilian side, I am a GS-12 employee of the Department of the Army (DA). Recently, I used USA Jobs³ to apply for a GS-13 DA civilian position at another military installation. I was interviewed for the position and offered the job, which I accepted. I moved my family five states away and reported as ordered to the new job. On my first day at work at the new job, I was told that as a condition of being hired in the new job I must formally resign from the Army Reserve, and I do not want to do that.

I have read and reread your Law Review 10044 (August 2010), titled “A Federal Agency Cannot Make You Quit the Reserves.” In that article you cited *Baker v. Department of Homeland Security*, about a Navy Reservist who was forced to quit the Navy Reserve after he was hired as a Special Agent for the Secret Service. The Merit Systems Protection Board (MSPB) ordered the Department of Homeland Security (DHS) to allow Baker to reaffiliate with the Navy Reserve and to compensate him for the drill pay, annual training pay, and reserve retirement credit that he lost by obeying the unlawful DHS order to quit the Navy Reserve.

I printed a copy of your Law Review 10044 and provided it to the Staff Judge Advocate and Civilian Personnel Office where my new job is located. Both the JAG and the civilian personnel officer insist that your article is wrong and that I must resign the Army Reserve before starting my new job. They have cited Paragraphs 1-10 and 1-11 of Army Regulation 690-11, dated 26 May 2004. That regulation is titled “Use and Management of Civilian Personnel in Support of Military Contingency Operations.” I wish that somebody had told me this before I sold my house and moved my family across five states to take this new job.

What do you say about this?

A: I adhere to what I wrote in August 2010, in Law Review 10044. I did a computer search on *Baker v. Department of Homeland Security*, and the case has not been overruled or criticized in any subsequent MSPB decision. The “you must quit the reserves” language in AR 690-11 is unlawful under USERRA, just like the Secret Service rule struck down by the MSPB in *Baker*. A federal agency cannot, by regulation, override a federal statute like USERRA.⁴

I think that it is totally unsatisfactory that the Army, as a civilian employer, flouts USERRA. The Army is the principal beneficiary of USERRA. Without a law like USERRA, the Army and the other services would not be able to recruit and retain a sufficient quality and quantity of personnel to defend our country. How do we get civilian employers to comply with USERRA when they see that the Army flouts this law with respect to its own employees?

³ USA Jobs is a website operated by the United States Office of Personnel Management (OPM). Vacancies in federal executive agencies are announced in USA Jobs and applicants use the site to apply for federal civilian positions.

⁴ 38 U.S.C. 4302(b).

Q: Was *Baker* appealed to the United States Court of Appeals for the Federal Circuit?

A: No. A person claiming that his or her USERRA rights were violated by a federal executive agency can appeal to the Federal Circuit if he or she loses at the MSPB, but a federal agency cannot appeal from the MSPB to the Federal Circuit.⁵

UPDATE: October 2019

It is unlawful for a federal agency, as employer, to force you to quit a Reserve Component, but if your federal civilian position has been designated a "key employee" position your Reserve Component will likely screen you out of active participation. Please see [Law Review 19095](#) (October 2019).

⁵ 38 U.S.C. 4324(d)(1).