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You Have the Right to Reemployment even if that Means that another Employee Must Be Displaced

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Update on Sam Wright

1.1.1.2—USERRA applies to small employers
1.1.3.1—USERRA applies to voluntary service
1.3.2.1—Right to prompt reinstatement after service

Q: I am a third-class petty officer (E-4) in the Coast Guard Reserve and a member of the Reserve Officers Association (ROA).[3] On the civilian side, I have worked since 2015 as the cook for a small diner—let's call it Bob & Edward's Diner (B&ED). Bob and Edward Smith (brothers) are the owner-operators of B&ED, and the diner has only 11 employees, including one cook. Bob and Edward have given me a hard time about my Coast Guard Reserve service, and I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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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] In 2013, ROA members amended the ROA Constitution and made noncommissioned officers and petty officers eligible for full membership, including voting and running for office.

I am currently on a one-year voluntary tour of active duty in the Coast Guard, from 10/1/2017 until 9/30/2018. I recently learned that it is unlikely that the Coast Guard will extend my orders beyond September 30, so I contacted Bob and Edward to inquire about returning to my job in October. Unfortunately, their reaction was most unfavorable. They told me that USERRA does not require them to reemploy me at the diner for three reasons:

a. **The diner has only 11 employees, and employers with fewer than 15 employees are exempt from federal employment laws.**
b. **I volunteered for this one-year active duty assignment, and USERRA only applies to individuals who are called to active duty involuntarily.**
c. **The diner only needs 11 employees, including only one cook. When I left my job for active duty they hired Mary Jones as the cook, and she is doing a fine job. They are not willing to reemploy me because that would necessarily mean displacing Jones.**

What do you say about these contentions?

Answer, bottom line up front:

If you meet the five USERRA conditions[4] you will have the right to prompt reemployment in the position of employment that you would have attained if you had been continuously employed or another position (for which you are qualified) that is of like seniority, status, and pay.[5] Neither the small size of the employer nor the voluntary nature of your active duty nor the lack of a vacancy at the time you apply for reemployment will defeat your right to reemployment.

Explanation

USERRA applies to very small employers.

[4] As I have explained in Law Review 15116 (December 2015) and many other articles, you must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service, and you must have given the employer prior oral or written notice. It seems clear that you meet these two conditions already. Your cumulative period or periods of uniformed service relating to the employer relationship for which you seek reemployment must not have exceeded five years, and there are nine exemptions from the five-year limit. Please see Law Review 16043 (May 2016). You began your job at B&ED in 2015, so you have not exceeded the five-year limit even if the current year of active duty counts toward the limit. You must have been released from the period of service without having received a disqualifying bad discharge from the military. You will meet that criterion on 9/30/2018, unless you have done something stupid during this active duty period. After release from a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). You can certainly make a timely application for reemployment after 9/30/2018.

[5] 38 U.S.C. 4313(a).

Other federal employment laws[6] apply to employers with 15 or more employees, but the federal reemployment statute has never had a threshold based on the size of the enterprise or the number of employees. You only need one employee to be an "employer" for purposes of the federal reemployment statute.[7]

USERRA applies to voluntary service.

The federal reemployment statute has applied to voluntary as well as involuntary military service since 1941.[8]

You have the right to reemployment even if that means that another employee must be displaced.

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that your right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit[9] has held:

> Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that "the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.[10]

The United States Court of Appeals for the Federal Circuit[11] has held:

> The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols' [Nichols was the returning veteran and plaintiff] former position was "unavailable" because it was occupied by another and thus

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[6] Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, etc.

[7] *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992). This is a 1992 decision of the United States Court of Appeals for the 5th Circuit, the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. The citation means that you can find this decision in Volume 961 of *Federal Reporter Second Series,* starting on page 58. The specific language about very small employers can be found on page 60.

[8] Please see Law Review 30 (October 2001).

[9] The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[10] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49, 55-56 (1st Cir. 2013).

[11] The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[12]

[12] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite the reader's attention to *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981).