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Veteran with Entry Level Separation Has the Right to Reemployment

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Update on Sam Wright

1.3.1.2—Character and duration of service
1.8—Relationship between USERRA and other laws/policies

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

- *A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.*
- *A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.*
- *A dismissal of such person permitted under section 1161(a) of title 10.*
- *A dropping of such person from the rolls pursuant to section 1161(b) of title 10.*[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] 38 U.S.C. 4304.

Petty v. Metropolitan Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008), *cert. denied,* 556 U.S. 1165 (2009) (*Petty 1).

Petty v. Metropolitan Government of Nashville-Davidson County,* 687 F.3d 710 (6th Cir. 2012) (*Petty 2).

Q: I am the owner-operator of an intermediate size business, with 100 employees. One employee (let's call him Joe Smith) informed me in February that he was leaving his job to join the Army and that he would be on active duty for at least four years. He reported to boot camp on 4/1/2018 and was discharged just 40 days later, on 5/10/2018. On 5/13/2018, he visited me in my office and gave me a letter in which he formally applied for reemployment, citing the Uniformed Services Employment and Reemployment Rights Act (USERRA). I asked to see his Army discharge paperwork and he showed me a form saying that his discharge is "uncharacterized." What does that mean? Does a person with an "uncharacterized" discharge have the right to reemployment under USERRA?

A: Since 1982, it has been the policy of the Department of Defense *not to characterize* the service of enlisted members who are discharged *for whatever reason* during the first 180 days of service. These "uncharacterized" discharges or "entry level separations" are common. If Joe meets the five USERRA conditions, he has the right to reemployment under USERRA.

As I have explained in Law Review 15116 (December 2015) and many other articles, a person must meet these five conditions to have the right to reemployment:

a. You must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services (as defined by USERRA).
b. You must have given the employer prior oral or written notice.
c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that you have performed with respect to the employer relationship for which you seek reemployment.[4]
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.[5]
e. After release from the period of service, you must have made a timely application for reemployment.[6]

[4] As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit—that is, there are nine kinds of service (including all involuntary service and some voluntary service) that do not count toward exhausting your five-year limit. You have a five-year limit with respect to your employer relationship with the local school district and another limit (perhaps different) with the company that operates the store.
[5] Please see Law Review 18039 (May 2018).
[6] After a period of service of 31-180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C).

Section 4304 of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[7] provides that an individual who has received one of the enumerated unfavorable discharges from military service is disqualified from having the right to reemployment in his or her pre-service civilian job, even if he or she meets the other four USERRA conditions.[8] Section 4304(1) provides that a person who has received "a dishonorable or bad conduct discharge" is disqualified from the right to reemployment.

In 1950, President Harry Truman signed into law the Uniform Code of Military Justice (UCMJ).[9] The UCMJ provides for general courts martial for the most serious criminal offenses and for special courts martial for lesser offenses. A general court martial can award a dishonorable discharge or bad conduct discharge (among other serious punishment) upon an enlisted service member convicted of serious misconduct.[10] A special court martial can award a bad conduct discharge (and other punishment) upon an enlisted service member convicted of misconduct.

Section 4304(3) provides that a person who has received a "dismissal" is disqualified from having the right to reemployment. A general court martial can award a dismissal upon a commissioned officer convicted of serious misconduct.[11] A dismissal is the equivalent of a dishonorable discharge, but for a commissioned officer rather than an enlisted member.

Section 4304(4) provides that a person who has been "dropped from the rolls" is disqualified from reemployment. Here is the statutory provision for dropping a commissioned officer from the rolls:

> The President or the Secretary of Defense, or in the case of a commissioned officer of the Coast Guard, the Secretary of the department in which the Coast Guard is operating when it is not operating in the Navy,[12] may drop from the rolls of any armed force any commissioned officer (1) who has been absent without authority for at least three

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[7] 38 U.S.C. 4304.

[8] As I have explained in detail in Law Review 15116 (December 2015) and many other articles, a person must have met five conditions to have the right to reemployment under USERRA. The person must have left the civilian job to perform voluntary or involuntary uniformed service and must have given the employer prior oral or written notice (unless giving prior notice was precluded by military necessity or otherwise impossible or unreasonable). The person must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that he or she has performed, relating to the employer relationship for which he or she seeks reemployment. Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit and the nine exemptions—kinds of service that do not count toward exhausting the person's limit. As discussed in detail in this article, the person must have been released from the period of service without having received one of the disqualifying bad discharges enumerated in section 4304. Finally, the person must have made a timely application for reemployment with the pre-service employer after release from the period of service. After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[9] The UCMJ is codified at 10 U.S.C. 801 et seq.

[10] 10 U.S.C. 818.

[11] 10 U.S.C. 1161(a).

[12] Since 2003, the Coast Guard has been part of the Department of Homeland Security. In time of war, the Coast Guard can become a separate service within the Navy. This last happened during World War II.

> months, (2) who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court-martial, or (3) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final.[13]
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> Section 4304(2) provides that a person who has received "a separation of such person from such uniformed service under conditions other than honorable" is not entitled to reemployment at his or her pre-service job. This refers to an "other than honorable" administrative discharge.

As I explained in Law Review 17068 (June 2017), *The USERRA Manual* by Kathryn Piscitelli and Edward Still, is the definitive reference on USERRA. In their book, Ms. Piscitelli and Mr. Still write: "So long as a returning employee's character of service does not fall within one of the disqualifying statutory categories set forth in section 4304 of USERRA, his or her conduct during military service will not support a denial of reemployment rights."[14]

Brian Petty was a captain in the Army Reserve and a sergeant in the police department of the Metro Government of Nashville-Davidson County (Metro). The Army called him to active duty in January 2004. He and the unit he commanded deployed to Camp Navistar in Kuwait. He was charged with violations of the UCMJ, alleging that he manufactured, possessed, and consumed alcohol (homemade wine) and provided some of it to a female enlisted soldier under his command, all in violation of a lawful general order applicable to U.S. military personnel in Southwest Asia.

Petty appeared before a military judge for arraignment on these charges, and then he agreed to resign his commission "for the good of the service" in lieu of court martial. He received a general discharge under honorable conditions, and he was sent home, his military career over.

After returning home to Nashville, Petty made a timely application for reemployment with the police department. He met the five USERRA conditions, in that he left his job to perform service, gave the employer prior notice, did not exceed the cumulative five-year limit,[15] was released from the period of service without one of the enumerated disqualifying discharges, and made a timely application for reemployment.

Despite his misconduct in Iraq, Petty did not receive one of the disqualifying bad discharges enumerated in section 4304 of USERRA. The legal maxim *expressio unius est exclusio alterius* applies here. That maxim has been defined as follows: "Expression of one thing is the exclusion

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[13] 10 U.S.C. 1161(b).

[14] *The USERRA Manual,* section 4:4. This sentence can be found on page 109 of the 2017 edition of the *Manual.* In footnote 13 on that page, Piscitelli and Still cite *Petty v. Metropolitan Government of Nashville-Davidson County,* 538 F.3d 431, 411 (6th Cir. 2008), *cert. denied,* 556 U.S. 1165 (2009) in support of this proposition.

[15] Because Petty was involuntarily called to active duty, his service in Kuwait did not count toward his five-year limit.

of another. … Mention of one thing implies exclusion of another. … When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its application may be inferred."[16]

Section 4304 of USERRA sets forth four bad discharges that disqualify a returning veteran from the right to return to his or her pre-service job. Thus, no other events (like receiving a general discharge after resigning in lieu of court martial) can disqualify the individual. The *Petty* case strongly supports this interpretation. *Petty 1,* 538 F.3d at 443.

When Petty applied for reemployment after his general discharge, the Metro police department leadership suspected that something untoward had happened during the time that he was away from work of military service, but they were not initially familiar with the details of what had happened in Kuwait. The department delayed reinstating Petty into the position of employment he had left and almost certainly would have continued to hold had he not been called to the colors. The department applied its "return to work" policy and subjected him to a lengthy internal affairs investigation.

The department can lawfully apply its return to work policy to a police officer who resigned his or her job for reasons unrelated to military service and later seeks to return to the department. The department cannot lawfully apply this policy to a person who left his or her job for voluntary or involuntary military service and seeks to return to the job after release from service.

Section 4302(b) of USERRA provides:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.*[17]
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> Petty argued (through attorney Michael J. Wall of Nashville) that Metro's return-to-work policy was an "additional prerequisite" to the right to reemployment and that section 4302(b) precluded Metro from applying that additional prerequisite to Petty. The District Court rejected that argument and granted Metro's summary judgment motion. Petty timely appealed to the 6th Circuit[18] and the appellate court accepted Petty's argument and overturned the summary judgment for Metro and granted summary judgment for Petty. The 6th Circuit held:

[16] *Black's Law Dictionary, Revised Fourth Edition,* page 692 (internal citations omitted).
[17] 38 U.S.C. 4302(b) (emphasis supplied).
[18] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

The district court determined that Metro's return-to-work procedures could be applied to Petty, finding that because they are applicable to all individuals regardless of military service, these procedures did not constitute "additional prerequisites." In this, the district court erred. First, § 4302(b) does not limit its superseding effect only to "additional prerequisites." It supersedes any "policy, plan, [or] practice" that "reduces, limits, or eliminates in any manner any right or benefit" provided by USERRA, "including," but not necessarily limited to, "the establishment of additional prerequisites." Second, Metro's return-to-work procedures *do* constitute "additional prerequisites" for returning veterans, because the procedures are in addition to the requirements Congress specified for the exercise of USERRA's reemployment rights. The district court apparently viewed the term "additional prerequisites" as meaning "additional to the *employer's* existing prerequisites," and concluded that Metro's procedures are not discriminatory because they apply to all individuals returning to the department. But this analysis is not appropriate for a claim brought under § 4312, and the superseding effect of § 4302(b) is not so limited; Metro's return-to-work procedures are indeed superseded by USERRA's reemployment provisions.

It is important to note that Petty was not required to make any showing of discrimination in order to sustain either of his reemployment claims. The district court incorrectly characterized part of Petty's reemployment claim -- that part dealing with the position to which he was reinstated -- as being part of his discrimination claims and therefore held that it required a showing of discrimination. The district court did not state its authority for this, but Metro finds support for the court's view in the following language from this Circuit's decision in *Curby v. Archon:* "a person seeking relief under § 4312 must also meet the discrimination requirement contained in § 4311." 216 F.3d at 557. However, this language from *Curby* was merely dicta and is therefore not binding precedent. *See Wrigglesworth,* 121 F. Supp. 2d at 1137 (characterizing this part of *Curby* as dicta); *Jordan v. Air Prods. & Chems., Inc.,* 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2002) (same). Furthermore, subsequent to *Curby,* the Department of Labor specified that "[t]he employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment." 20 C.F.R. § 1002.33; *accord Francis,* 452 F.3d at 303 ("[T]he procedural requirements of the two provisions differ. An employee proceeding under § 4311 has the burden of proving that the employer discriminated against him or her based on a status or activity protected by USERRA. 20 C.F.R. § 1002.22 (2006). Section 4312 imposes no such burden. 20 C.F.R. § 1002.33 (2006)."). Finally, the imposition of § 4311's discrimination requirement on a reemployment claim is not consistent with the plain language of §§ 4312 and 4313. Section 4313 states that any "person entitled to reemployment under section 4312" -- which we have found Petty to be -- "shall be promptly reemployed in a position of employment in accordance with the" order of priority outlined in § 4313(a)(2). Thus, the express terms of § 4313 make its application contingent only on the prerequisites of § 4312, none of which include a showing of discrimination.[19]

[19] *Petty 1,* 538 F.3d at 442-43.

After losing *Petty 1,* Metro applied to the Supreme Court for certiorari,[20] which was denied. At that point, Metro should have reinstated Petty to his proper position, paid him back pay, and moved on, but the employer chose not to take that sensible course. Instead, Metro continued to fight Petty and defiantly refused to reinstate Petty to his former position as a patrol sergeant.[21]

Petty renewed his case in the District Court, seeking to enforce the 6th Circuit mandate and to resume his former position as a patrol sergeant, with back pay. After a bench trial,[22] the District Court awarded Petty back pay and partial liquidated damages[23] and ordered his reinstatement. Both parties appealed to the 6th Circuit.

The District Court awarded Petty $2,500 in back pay for the initial three-week delay in reinstating him to the payroll after he applied for reemployment and $172,058.67 in back pay from the date of his firing (late 2007) until his court-ordered reinstatement. Of the $172,058.67 in back pay, $120,116.43 was for the period *after* the 6th Circuit decided *Petty 1.* The District Court determined that Metro's violation of USERRA was willful after the first 6th Circuit decision but not willful before that decision (*Petty 1*). Thus, the District Court awarded liquidated damages in the amount of $120,116.43. In *Petty 2,* the 6th Circuit rejected Metro's appeal and Petty's appeal and affirmed the relief that the District Court awarded.

Joe Smith's "uncharacterized" discharge is not one of the disqualifying bad discharges enumerated in section 4304 of USERRA.[24] Just as Brian Petty was entitled to reemployment under USERRA despite his general discharge (in lieu of court martial), so Joe Smith is entitled to reemployment despite his uncharacterized entry level separation.

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[20] The final step in the federal appellate process is to apply to the Supreme Court for a writ of certiorari. Certiorari is granted if at least four of the nine Justices vote for certiorari in a conference to consider such petitions. If certiorari is granted, there are new briefs and oral arguments in the Supreme Court and a Supreme Court decision. If certiorari is denied, the decision of the Court of Appeals becomes final. Certiorari is denied in 99% of the cases in which it is sought.

[21] Metro never properly reinstated Petty, assigning him only to administrative duties typically assigned to an officer in a disciplinary status, and Metro fired Petty in late 2007.

[22] A bench trial is a trial without a jury.

[23] Section 4323(d)(1)(C) of USERRA, 38 U.S.C. 4323(d)(1)(C), provides for the court to award a successful USERRA plaintiff liquidated damages in the amount of the actual damages (thus doubling the damages) if the court finds that the employer-defendant violated USERRA willfully.

[24] 38 U.S.C. 4304.