

LAW REVIEW 18058¹

July 2018

Instructive New USERRA Case

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[Update on Sam Wright](#)

1.1.3.3—USERRA applies to National Guard service

1.3.2.1—Prompt reinstatement after service

1.4—USERRA enforcement

Mace v. Willis, 259 F. Supp. 3d 1007 (D.S.D. 2017).³

The plaintiff in this case is Kiesha Mace, an enlisted member of the Army National Guard (ARNG). The defendant is Corey Willis, the owner-operator of Kickbox Dakota LLC, a franchisee of 9 Round Fitness, a chain of kickbox gyms. Mace was hired on 4/25/2016. Kickbox had 11

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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (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 This is a recent decision by United States Magistrate Judge Veronica L. Duffy of the United States District Court for the District of South Dakota. The citation means that you can find this decision in Volume 259 of *Federal Supplement Third Series*, starting on page 1007.

part-time employees, including Mace, plus one manager and the owner-operator (Willis). Mace was away from her Kickbox job for ARNG annual training from 7/15/2016 to 8/8/2016. Although she met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA),⁴ Mace was not promptly reinstated to the position of employment that she left to perform her ARNG annual training, and this lawsuit resulted.

Kickbox used the “When I Work” application to schedule part-time employees (including Mace) for work. Willis and his one full-time manager established the monthly schedule, but the individual employee could only see his or her schedule on a weekly basis. During her short period of employment at Kickbox, Mace worked an average of 13.6 hours per week, including hours that she worked on an impromptu basis when other employees failed to show up for scheduled shifts and Mace agreed to fill in.

On 7/15/2016, Mace worked a scheduled shift at Kickbox and left late that day to travel to Alaska for her ARNG annual training. On that day, Willis deleted Mace’s name from the “When I Work” application to save the \$11 per month per employee monthly cost and because it was easier for the manager to use the application if only available employees were shown on the application. Willis did not inform Mace that she had been taken off the application and she did not realize that until after she returned from her ARNG annual training, because she did not have Internet access while in Alaska.

On 8/8/2016, Mace completed her ARNG annual training in Alaska and returned to South Dakota, as scheduled. She immediately tried to log in to the “When I Work” application but was unable to do so. It soon became clear that Willis had replaced her to hire another employee. Judge Duffy correctly held that the fact that another employee had been hired in no way excused Willis’ failure to reemploy Mace:

"If mere replacement of the employee would exempt an employer from [USERRA], its protections would be meaningless." [Davis, 961 F. Supp. 2d at 727](#) (quoting [Cole v. Swint](#),

⁴ As I have explained in Law Review 15116 (December 2015) and many other articles, a person must leave a civilian position of employment (federal, state, local, or private sector) perform “service in the uniformed services” as defined by USERRA and must give the employer prior oral or written notice. The person’s cumulative period or periods of uniformed service, related to the employer relationship for which the person seeks reemployment, must not have exceeded five years, and nine kinds of service (including ARNG annual training as in this case) are exempt from the computation of the individual’s five-year limit. Please see Law Review 16043 (May 2016). The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from service, the person must have been timely in reporting back to work or applying for reemployment. After a period of service lasting fewer than 31 days, as in this case, the person is required to report for work at the start of his or her first regularly scheduled work period on the first calendar days after the completion of the period of service, the time reasonably required for safe transportation from the place of service to the person’s residence, plus eight hours for rest. 38 U.S.C. 4312(e)(1)(A). It was clear beyond dispute that Mace met these five conditions.

[961 F.2d 58, 60 \(5th Cir. 1992\)](#)). Under USERRA, "an 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.'" [Davis, 961 F. Supp. 2d at 730](#) (quoting [20 C.F.R. § 1002.139\(a\)](#)). "A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee." *Id.* (quoting [Nichols v. Dept. of Veterans Affairs, 11 F.3d 160, 163 \(Fed. Cir. 1993\)](#)). An employer cannot claim as a defense that it will be required to "bump" or demote one of its present employees. [Goggin v. Lincoln St. Louis, 702 F.2d 698, 703-04 \(8th Cir. 1983\)](#). "USERRA requires that 'the employee should be restored to his position even though he has been temporarily replaced by a substitute who has been able . . . to make it desirable to make the change permanent.'" [Davis, 961 F. Supp. 2d at 731](#) (quoting [Kay v. Gen. Cable Corp., 144 F.2d 653, 655-56 \(3d Cir. 1944\)](#)).⁵

Judge Duffy found that Willis violated Mace's USERRA reemployment rights and awarded her \$979.20 in back pay, for the period between 8/8/2016 (when she completed her ARNG training and sought to return to work) and 9/19/2016 (when she found another job). The judge also found that Willis violated USERRA willfully and awarded her an additional \$979.20 in liquidated damages,⁶ and indicated that she would also likely award attorney fees to Mace.⁷ The amount awarded in attorney fees sometimes greatly exceeds the cash award to the plaintiff.⁸

UPDATE—JULY 2018

Please see [Law Review 18060](#) (July 2018) for further information about this case and this issue.

⁵ *Mace*, 259 F. Supp. 3d at 1016-17.

⁶ USERRA provides that if the court finds that a private employer has violated USERRA willfully it shall award liquidated damages in the amount of the actual damages, this doubling the damages. 38 U.S.C. 4323(d)(1)(C).

⁷ 38 U.S.C. 4323(h)(2).

⁸ Please see Law Review 17023 (March 2017).