LAW REVIEW[1] 18060
July 2018

Employers who Violate USERRA *Willfully* Should Have To Pay a Substantial Penalty

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

1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

Q: I am a recently retired Colonel in the Army Reserve and a life member of the Reserve Officers Association (ROA). Throughout my long Army Reserve career (1987-2017), I frequently had problems with my civilian employers about my Army Reserve obligations and my absences from work necessitated by those obligations. Accordingly, I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I read with interest your recent Law Review 18058 (July 2018), concerning the case of *Mace v. Willis,* 259 F. Supp. 3d 1007 (D.S.D. 2017). In the case, as you explained it in your article, the

[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.

court found that the employer (Willis) violated USERRA *willfully,* but the amount that Mr. Willis was required to pay to the plaintiff (Ms. Mace) was only $1958.40. Why is that amount so modest? It seems that USERRA is a "toothless tiger" if an employer can violate the law willfully and get off by paying less than $2000. The employer probably saved a lot more than $2000 by flouting Mace's USERRA rights. Under these circumstances, what incentive does an employer have to comply with this essential federal law?

A: I entirely agree that the law should provide for an employer that violated USERRA willfully should have to pay a substantial financial penalty, even if the financial harm to the individual plaintiff is modest, as in the *Mace* case. Unfortunately, this will require a statutory change to USERRA.

USERRA currently provides as follows concerning the relief that a federal district court can award to a successful USERRA plaintiff in a case against a private employer:

> **(1)** In any action under this section, the court may award relief as follows:
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> **(A)** The court may require the employer to comply with the provisions of this chapter.
>
> **(B)** The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
>
> **(C)** *The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.*[3]

Under section 4323(d)(1)(B), the amount that the court can award to the successful USERRA plaintiff is limited to her *pecuniary* damages—salary or wages that she should have received but did not receive because the employer violated USERRA.[4] Mace was only paid $12 per hour and she only worked 13.6 hours per week on average. After the employer violated USERRA by refusing to reinstate her upon her return from Army National Guard training, she quickly found another job paying more than she had been making at Willis' gym.[5] Accordingly, her pecuniary damages for the loss of the job only came to $979.20. Under section 4323(d)(1)(C), the amount of the liquidated damages for willfully violating USERRA was limited to the amount of her pecuniary damages, and even when doubled the damage amount was quite modest.[6]

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[3] 38 U.S.C. 4323(d)(1) (emphasis supplied).

[4] The court can also award the plaintiff the cash value of fringe benefits, like health insurance or pension benefits, that she lost because of the violation. Mace was a part-time health club worker with no fringe benefits.

[5] At her new job, she made $11.50 per hour, but for many more hours per week.

[6] Under section 4323(d)(1)(A), Mace could have gotten a court order requiring Willis to reinstate her, but since she had found another job paying more she did not want or need reinstatement at the gym.

I invite the reader's attention to Law Review 15088 (October 2015). In that article, I explained in detail the limitations on the relief that a federal court can award to a successful USERRA plaintiff, and I proposed that Congress amend USERRA to provide for additional remedies for willful USERRA violations. I invite the reader's attention to the final paragraph of Law Review 15088:

> Section 1981a was added to title 42 of the United States Code by the Civil Rights Act of 1991.[7] Title VII of the Civil Rights Act of 1964 forbids discrimination in employment on the basis of race, color, sex, religion, or national origin. Between 1964 and 1991, only *pecuniary*[8] damages could be awarded for violating Title VII. The 1991 law added important new remedies that can be awarded for intentional employer violations of Title VII. We need an amendment to USERRA, along the lines of what Congress enacted in 1991. I suggest that we use the language of section 1981a in drafting that amendment.

I reiterate what I wrote in October 2015. The case of *Mace v. Willis* is an excellent example of the need for such an amendment.

[7] Public Law 102-166, 105 Stat. 1072 (Nov. 21, 1991).
[8] Emphasis in original.