

LAW REVIEW¹ 18067

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You Have a Duty To Mitigate your Damages

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[Update on Sam Wright](#)

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Q: I am a third-class petty officer (E-4) in the Coast Guard Reserve (USCGR) and a member of the Reserve Officers Association (ROA).³ Until recently, my civilian job was at a commercial gym. I was only paid an hourly wage that was only a little higher than the federal minimum wage and I was only working about 15 hours per week—that is the limit of the hours that the employer permitted me to work.

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 In 2013, ROA members amended the ROA Constitution and made petty officers and non-commissioned officers eligible for full membership in the organization, including voting and running for office.

My situation was very similar to that of Ms. Mace, the Army National Guard member and plaintiff in the case you discussed in Law Review 18058 (July 2018). I was away from my job at the gym for three weeks for my required annual training in my USCGR unit. I gave Benedict Arnold, the owner-operator of the gym, both oral and written notice more than two months in advance. I also asked the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR) to send Mr. Arnold a polite letter with a basic fact sheet about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I know that ESGR sent such a letter as I requested. I wanted to make sure that Mr. Arnold would not be able to claim ignorance of USERRA.

When I left my job to report to my required USCGR annual training, Mr. Arnold deleted my name from the scheduling application that I and other gym employees used to learn of our assigned work schedules, although Mr. Arnold knew that I would be returning and seeking reemployment just three weeks later. When I returned from my USCGR annual training, I immediately visited the gym and dropped off a formal, written application for reemployment. Mr. Arnold refused to meet with me and ordered me to leave the gym, and he never took or returned any of my telephone calls.

I know a man who is about to open a new gym in the same neighborhood, and it is likely that I can get a job with him, a job paying substantially more per hour and for 40 hours per week. I want to apply for a job at the new gym, but I fear that this will mean that the unpatriotic SOB Arnold will get off almost scot-free for violating USERRA willfully, as in the *Mace v. Willis* case that you discussed in Law Review 18058.

Mary Advocate, Esq. is a local attorney who represents employees with claims against employers. I have asked her to represent me in my USERRA claim against Mr. Arnold. She told me that I have strong evidence of liability in my claim against Arnold but that the amount of money that can be recovered is very limited and that the case is not worth bringing.

I told Ms. Advocate that I will forego seeking other employment opportunities, including at the new gym that is about to open, to build up the value of my case against Mr. Arnold, because I want that unpatriotic SOB to have to pay. Ms. Advocate told me that I have a *duty to mitigate damages* and that I simply do not have the option to forego seeking other employment to build the cash value of my case.

Is Ms. Advocate correct? What is the *duty to mitigate damages*? How does this concept apply to a case like mine?

A: Ms. Advocate is correct. The legal concept of “duty to mitigate damages” has been defined as follows:

When a person suffers damages as a result of a breach of contract or tort, he or she has the legal obligation to minimize the effects and losses resulting from the injury. The duty to mitigate works to deny recovery for any part of the damages that could have been reasonably avoided.⁴

If you fail to mitigate your damages by seeking and applying for other employment opportunities, the amount that you *could have received* by making a reasonable effort to mitigate your damages will be deducted from your back-pay award. Thus, failing to apply for a job at the new gym would be foolish for both legal and practical reasons.

I invite your attention to my Law Review 15089 (October 2015). The title of the article is “Proposals To Improve USERRA.” I invite your attention specifically to Section 4 on page 7 of this very long article. I propose that when an employer has violated USERRA willfully it should be required to pay liquidated damages in the amount of the actual damages or \$50,000, *whichever is greater*.

This is only Sam’s proposal—it has not been enacted. Your situation is a good example of the need for such a provision.

⁴ See <https://www.legalmatch.com/law-library/article/duty-to-mitigate-damages.html>.