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Understand and then Insist upon your USERRA Rights

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Update on Sam Wright

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Keene v. Clark County School District, **2016 U.S. Dist. LEXIS 85245 (D. Nev. June 30, 2016).[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. 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 2016 decision by Judge Andrew P. Gordon of the United States District Court for the District of Nevada.

Richard B. Keene, an enlisted Army Reservist, was hired by the Clark County School District (CCSD) as a mathematics teacher in August 2004. In 2005, he applied for and was hired in an administrative position called "Data Coordinator III." In 2007, he informed the CCSD that he would be mobilized, together with his Army Reserve (USAR) unit, in 2008, for deployment to Iraq. It appears that both Keene and the CCSD were confused about some of the details of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Because of the planned mobilization and deployment, Keene and his unit were ordered to participate in extra training sessions (on top of the normal one drill weekend per month and two weeks of annual training expected of all reservists) between August 2007 and May 2008, and the unit was mobilized in September 2008. The CCSD apparently granted Keene military leave for each of these training sessions, but (according to Keene) Arlene Lewis (his direct supervisor) expressed hostility to him each time he asked for time off from work for USAR training and told him in early 2008 that he needed to "make up his mind" whether he wanted to work for the CCSD or for the Army.[4]

The right to time off from a civilian job (federal, state, local, or private sector) for military training or service is not limited to the traditional pattern of "one weekend per month and two weeks in the summer" that was typical in the Reserve Components[5] in the period between July 1953 (when the Korean War ended) and August 1990 (when Iraq invaded Kuwait and President George H.W. Bush ordered a forceful military response that included calling up National Guard and Reserve units). The right to reemployment under USERRA applies to all voluntary and involuntary service, subject only to the five-year limit (which has nine exemptions—kinds of service that do not count toward exhausting an individual's five-year limit with respect to his or her most recent civilian employer).[6]

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

a. Must have left a civilian job (federal, state, local, or private sector) to perform uniformed service.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship for which he or she

[4] Lewis testified that she did not remember having said that and claimed that she was supportive of his military responsibilities. This conflict is one of the "material issues of fact" that precluded granting summary judgment for either Keene or the school district.

[5] Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. According to a Department of Defense (DOD) report dated 8/7/2018, 958,766 RC members have been called to the colors for contingency operations since 9/11/2001, including 40,467 currently on active duty as of the date of the report. See https://mail.yahoo.com/d/folders/1/messages/AHlk72M_8tcyW3QPMgCA6JCgHqk.

[6] Please see Law Review 10019 (March 2010), Law Review 16043 (May 2016), and Law Review 18066 (July 2018).

seeks reemployment. There are nine exemptions—kinds of service that do not count toward exhausting the individual's limit.[7]

d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. Must have been timely in reporting back to work or applying for reemployment.[8]

A person who meets these five conditions is entitled to prompt reemployment in the position that he or she would have attained if continuously employed (usually but not always the position that he or she left) *even if that means that another employee must be displaced to make room for the returning service member or veteran.*[9]

Keene was away from his CCSD job for pre-deployment training from 5/5/2008 until 5/28/2008. Keene was under the impression that the Army would extend his training orders until September 2008, when he expected to be mobilized with his unit. Keene informed his direct supervisor that he would likely not be back to work until about September 2009, when he completed his deployment to Iraq, which he expected would last about one year.

During Keene's May 2008 training tour, the Army's "funding problems" upset his expectation that he would remain on training duty until the expected mobilization date. On 5/28/2008, the last day of his training duty, he contacted Lewis (his direct supervisor at CCSD) and informed her that the Army had not extended his orders, as expected, and that he would be returning to work the next day, 5/29/2008. Lewis told him: "Your services are no longer required." Keene interpreted that to mean that the school district had discharged him. He applied for unemployment compensation to help him deal with the financial hardship until his expected September mobilization. CCSD did not oppose his application for unemployment compensation, and his application was granted by the State of Nevada.

On 7/24/2008, Keene received his mobilization orders, directing him to report for active duty on 9/7/2008, and he reported as ordered. Although the USAR unit remained on active duty for more than a year and was "boots on the ground" in Iraq for most of that time, Keene was sent home early because of health issues. He was released from active duty and honorably discharged from the USAR on 10/29/2008. He made a timely application for reemployment and was reemployed, but he claimed that the position to which he returned was inferior to the position that he would have attained if he had been continuously employed.

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[7] Please see Law Review 16043 (May 2016).

[8] After a period of service lasting fewer than 31 days, like a drill weekend or a traditional two-week annual training tour, the individual must report for work at the start of his or her first regularly scheduled work period after the completion of the period of service, the time required for safe transportation from the place of service to the person's residence, and a period of eight hours following arrival at the person's residence. 38 U.S.C. 4312(e)(1)(A)(i). After a period of service lasting more than 30 days but less than 181 days, the person must apply for reemployment within 14 days after the end of the period of service. 38 U.S.C. 4312(e)(1)(C). After a period of service lasting 181 days or more, the person must apply for reemployment within 90 days after the end of the period of service. 38 U.SC. 4312(e)(1)(D).

[9] Please see Law Review 18054 (July 2018).

In March 2009, Keene asked CCSD to return him to a teaching position, and the district granted that request. After returning to the classroom, he made many applications for administrative positions in the school district,[10] but the district did not select him for any of the positions for which he applied. In May 2015, Keene "retired" from the school district, although it is unclear if he had enough years of school district service to qualify for a monthly pension check. Keene claimed that he was "forced to resign" because of CCSD's failure to comply with USERRA.[11]

After the end of discovery,[12] both CCSD and Keene filed motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure. The judge should grant a motion for summary judgment only if he or she can say, after a careful review of the evidence, that there is no evidence (beyond a "mere scintilla") in support of the non-moving party's claim or defense and that the moving party is entitled to judgment as a matter of law. In granting a motion for summary judgment, the judge is effectively saying that no reasonable jury could find for the non-moving party on that specific issue. Judge Gordon granted some of the summary judgment motions but denied most of them, meaning that there will be a trial on the remaining issues.[13]

Did Keene make a proper application for reemployment on 5/28/2008? On 6/13/2008?

Keene was vague, during his deposition, as to whether his communication to Lewis (his immediate supervisor) on 5/28/2008 (the last day of his 23-day USAR training period) was by e-mail or by telephone, and Lewis denied having received any communication from Keene at that time. Accordingly, Judge Gordon held that there was a material issue of fact on the question of whether Keene applied for reemployment on 5/28/2008, and that material issue of fact precluded granting summary judgment for either party on that question.

On 6/13/2008, Keene sent Lewis an e-mail stating:

> Due to an error at a higher headquarters, my Army orders for the months of June and July were approved by one command … but failed to be funded by the other command. … As such, I am back in town until July 21st when I report for Iraqi language training.[14]

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[10] Administrative positions apparently pay substantially better than teaching positions.

[11] In employment law, there is a concept of "constructive discharge." If the employer makes the employee's life intolerable and the employee then resigns, the resignation can be treated as a constructive discharge and challenged on that basis. The facts alleged by Keene, even if true, do not rise to the "constructive discharge" level.

[12] Discovery is the process whereby the parties to a lawsuit demand and obtain information from each other, in preparation for the trial. Discovery includes document demands, written interrogatories, depositions, etc. Discovery is often contentious and protracted.

[13] I have no information about the status of this case. It is possible that the parties agreed to a settlement and that the case is over.

[14] The language training orders were apparently also canceled because of funding issues. Keene did not report for Army duty again until 9/7/2008, when the mobilization began.

> The reason I'm letting you know this is that my mother-in-law noticed that my former position has been posted again and I am very much concerned that the schools in the northeast region [of CCSD] won't have proper support during the AYP appeals. I don't expect to be rehired by the district immediately since I know that I'll be leaving again in about six weeks but wanted to offer to come in as a temp to help support these schools through appeals. If you should need me please call.

Keene was ill-informed and confused about his USERRA rights and entirely too solicitous of the employer's needs and concerns. He had the right to reemployment at the school district even if he knew that he would likely be leaving again in about six weeks and even if his position had been filled and reemploying him would require displacing another employee. Section 4312(h) of USERRA provides:

> In any determination of a person's entitlement to protection under this chapter [USERRA], the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) [prior notice to the employer] and the notification requirements established in subsection (e) [timely application for reemployment] are met.[15]

If Keene had contacted me at the time, I would have advised him to send a formal application for reemployment, by certified mail, to the personnel director of the school, with a copy of the letter going to his direct supervisor. Please see Law Review 77 (June 2003) for a sample application for reemployment letter. USERRA does not require that the application for reemployment be in any specific form or even that the application be in writing but sending such a letter to the personnel department might have saved Keene a lot of trouble.

The Department of Labor (DOL) USERRA regulations provide as follows concerning how and to whom an application for reemployment may be made:

> **Is an application for reemployment required to be in any particular form?**
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> An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.[16]

[15] 38 U.S.C. 4312(h). Judge Gordon correctly cited this subsection and noted that it meant that the school district was required to reemploy Keene promptly after he completed the 23-day military training session in May 2008 even if he would be leaving again soon and even if reemploying him necessitated displacing another employee.
[16] 20 C.F.R. 1002.118 (bold question in original).

To whom must the employee submit the application for reemployment?

> The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest.[17]

In his opinion, Judge Gordon noted that there have been only two published cases where the returning veteran's communication to the employer was deemed too ambiguous to constitute an application for reemployment. In *Baron v. United States Steel Corp.*[18] the returning veteran told the employer that he was trying to go to college and that if he did not succeed in getting admitted to college he would come back and request work at the pre-service employer. Of course, that communication was too ambiguous to constitute an application for reemployment.

In *McGuire v. United Parcel Service*[19] the returning veteran inquired of the employer as to the proper procedure for applying for reemployment, and the employer told him to contact the employer's human relations supervisor. The veteran failed to contact the human relations supervisor. The court held that an inquiry about the procedure for applying for reemployment did not amount to an application for reemployment.

Judge Gordon held that the question of whether Keene had made a sufficient application for reemployment was a question of law, not a question of fact, and that Keene's application was sufficient.

What happens now?

Because Judge Gordon denied most of the motions for summary judgment, there will be a trial on the remaining contested issues of fact, unless the parties settle, which often happens. We will keep the readers informed of further developments in this interesting and important case.

Lessons to be learned from this case

The Department of Defense (DOD) and the services need to do a much better job of educating Reserve and National Guard service members about their legal rights under USERRA and about how to exercise and enforce those rights. The DOD organization called "Employer Support of the Guard and Reserve" (ESGR) does not have a lawyer on staff and does not do a good job of answering detailed legal questions from service members or employers.

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[17] 20 C.F.R. 1002.119 (bold question in original).
[18] 649 F. Supp. 537, 540 (N.D. Ind. 1986).
[19] 152 F.3d 673, 676 (7th Cir. 1998).

For exactly six years, from 6/1/2009 through 5/31/2015, I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. During that period, I received and responded to 35,000 e-mail and telephone inquiries from service members, military family members, attorneys, employers, reporters, congressional staffers, and others about military-legal questions. More than half of the questions were about USERRA.[20] During the life of the SMLC, I remained at my desk until 2200 Eastern Time so that Reserve and National Guard service members could call me from the privacy of their homes, outside their civilian work hours.

My paid gig at ROA ended more than three years ago. I have continued writing new "Law Review" articles for ROA, and I still access my ROA e-mail and telephone voice-mail messages and respond as possible, but I am unable as a volunteer to duplicate what I did as a full-time employee. I hope that at some point it will be possible for ROA to reestablish the SMLC, perhaps with a younger lawyer as the Director. I also hope to educate a new generation of Reserve and National Guard judge advocates about USERRA, to that they can give timely and correct advice to service members as needed. The mistakes that Keene made clearly show the need for this service.

[20] Please see Law Review 15052 (June 2015) for a detailed discussion of the accomplishments of the SMLC during its six-year run.