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Medical Appointments for Service-Connected Disability Do Not Amount to "Service in the Uniformed Services" for Purposes of USERRA

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

1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees
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***Kieffer v. Planet Fitness of Adrian LLC,* 2017 U.S. Dist. LEXIS 131969 (E.D. Mich. Aug. 18, 2017).[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 an informally published decision of Judge Judith E. Levy of the United States District Court for the Eastern District of Michigan.

Cary Kieffer served on active duty in the United States military[4] for 12 years, from 1996 until 2008. He did not work for the defendant employer before he enlisted in 1996. Kieffer was seriously wounded in action in an ambush at Mosul, Iraq. He received injuries to his eye and leg, as well as Post Traumatic Stress Disorder.

Kieffer was hired by Planet Fitness of Adrian LLC (PF) on 10/9/2015.[5] He informed the employer of his service-connected disabilities at the time of hiring. He needed time off from his job for medical appointments related to his disabilities. On 5/28/2016, he requested unpaid leave for three medical appointments during the week of 6/20/2016. It is unclear how the employer responded to his request, if at all, but Kieffer apparently took the time off and attended his scheduled medical appointments. On 7/5/2016, PF fired him "for no reason whatsoever."[6]

On 4/25/2017, Kieffer sued PF, asserting that the firing violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) as well as the Americans With Disabilities Act (ADA).[7] On 6/21/2017, PF filed a motion to dismiss Kieffer's federal claims (ADA and USERRA) under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and Judge Levy granted the motion.

Under Rule 12(b)(6), the judge should assume to be true that all the facts alleged by the plaintiff in his or her complaint. The judge should dismiss the complaint only if he or she can say that there is no relief that the court can grant *even if all the facts alleged by the plaintiff are true.*

Judge Levy concluded that USERRA does not require an employer to give an employee time off (even without pay) for medical treatment, even when the need for medical treatment is the direct result of a disability or condition sustained during active military service. Unfortunately, Judge Levy's conclusion is correct.

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[4] Kieffer's branch of the military was not stated in the court decision.

[5] The facts in this article come directly from Judge Levy's decision, and she took the facts directly from Kieffer's complaint. Because this is a decision on the defendant's motion to dismiss, the judge must take all the pleaded facts as true.

[6] PF's employees are not represented by a labor union, and there is no collective bargaining agreement limiting firing to "just cause." Accordingly, Kieffer and the other PF employees are considered "employees at will," like the great majority of private-sector employees in our country. Employees at will can be fired for any reason or no reason *but not a reason that is forbidden by a specific federal or state law.* Please see Law Review 0619 (May 2006). It is common that when firing an employee at will the employer will decline to state the employer's rationale for the firing, to avoid giving the fired employee "ammunition" for a wrongful discharge claim.

[7] Kieffer's ADA claim is not discussed in detail in this article, but I invite the reader's attention to Judge Levy's decision for a discussion of the ADA.

Section 4303 of USERRA[8] defines 16 terms used in this law. The term "service in the uniformed services" is defined as follows:

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.[9]

USERRA's definition of "service in the uniformed services" is broad but not unlimited. It does not include time away from work for medical *treatment,* but it does include time away from work for a medical or other *examination to determine fitness* for military service.[10]

In 2009, Representative Lloyd Doggett of Texas introduced H.R. 466, the proposed "Wounded Veteran Job Security Act." If enacted, that bill would have amended section 4303(13) of USERRA (the definition of "service in the uniformed services") by adding an additional item—time away from a civilian job for medical treatment necessitated by a wound, injury, or illness incurred during active military service. Unfortunately, that bill was not enacted. There remains a need for such an amendment.[11]

Because time away from a civilian job for medical treatment necessitated by a disability or condition sustained during active military service is not included in USERRA's definition of "service in the uniformed services," an employer is not required to give an employee time off (even without pay) for a medical appointment under circumstances like Kieffer's circumstances, and it is not unlawful for an employer to discipline an employee for absences from work for such medical appointments. Thus, Kieffer's complaint did not establish a USERRA violation *even if the facts are exactly as alleged by Kieffer in his complaint,* and Judge Levy dismissed Kieffer's USERRA complaint under Rule 12(b)(6).

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[8] 38 U.S.C. 4303.

[9] 38 U.S.C. 4303(13).

[10] Please see Law Review 09013 (April 2009).

[11] Please see page 17 of Law Review 15089 (October 2015). In that article, I make more than 20 proposals for statutory amendments to USERRA, and this is one of them,

This would have been an entirely different case if Kieffer had worked for PF before his relevant period of uniformed service, had left the job for service, had met the USERRA conditions for reemployment,[12] and had returned to work for the pre-service employer (PF) after service. In that case, the employer would have had the obligation to make reasonable efforts to accommodate the disability that Kieffer sustained in Iraq. If Kieffer could not qualify for the job even with reasonable accommodations, the employer would have been required to reemploy him in another position for which he was qualified or could become qualified with reasonable employer efforts.[13]

[12] As is explained in detail in Law Review 15116 (December 2015) and many other articles, a person must leave a civilian job to perform uniformed service (as defined by USERRA) and must give the employer prior oral or written notice. The person must be released from the period of service without having exceeded the five-year limit on the duration of the period or periods of uniformed service and without having received a disqualifying bad discharge from the military. After release from service, the person must have made a timely application for reemployment with the pre-service employer.

[13] Please see Law Review 08054 (November 2008).