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Can a "Partner" Have Reemployment Rights under USERRA?

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Update on Sam Wright

1.1.2.2—Independent contractors and partners

Q: I am a physician in the Air Force Reserve, recently off active duty for four years. I am a member of the Reserve Organization of America (ROA),[3] and I have read with great interest

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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] At its September 2018 annual convention, the Reserve Officers Association adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. 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. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more

many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I graduated from medical school in 2008 and completed my residency in 2012, at which time I was hired by a large, nationwide medical enterprise—let's call it Miser Permanently or MP. I enlisted in the Air Force in 2013 and served on active duty from 10/1/2014 until 9/30/2018. I think that I have met the five USERRA conditions for reemployment, and I read and utilized your Law Review 15116 (December 2015) in helping me to ensure that I met the conditions and that I can document that I met them.

I left my MP position to serve on active duty, and I gave MP both oral and written notice months before my departure in late September 2014. I performed no military service prior to 10/1/2014, so my four-year active duty period is well within USERRA's five-year limit. I served honorably and did not receive a disqualifying bad discharge from the Air Force. Indeed, I was not discharged at all—I just left active duty and affiliated with the Air Force Reserve. I applied for reemployment almost immediately, and well within the 90-day deadline to apply for reemployment after leaving an active duty period of 181 days or more.

I have returned to work at MP, but the organization has refused to treat me as if I had been continuously employed by MP during the four years that I was away from work for military service. MP's General Counsel insists that I do not have rights under USERRA because I am a "partner" and not an "employee."

Yes, it is true that I am called a "partner," like almost all the other physicians at MP. But I am compensated by salary and bonuses. I do not earn or receive money based on a share of the organization's profits, and I do not get a vote in electing the management or determining the organization's policies and procedures.

What do you think? Do I have rights under USERRA?

Answer, bottom line up front

Because you meet the five USERRA conditions and have returned to work at MP, the organization must treat you as if you had been continuously employed for civilian pension purposes, upon your reemployment. If you really are a partner, you are not an employee and you do not have rights under USERRA and other employment laws but calling you a "partner" does not make you one. Based on your description of your position, you are an employee and not a partner.

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dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

Explanation

To have the right to reemployment under USERRA, an individual must meet five simple conditions. The first condition is that the person's "absence *from a position of employment* is necessitated by reason of service in the uniformed services."[4] Thus, if the situation that the person wants to have reinstated after a period of uniformed service does not amount to a "position of employment," USERRA does not apply.

Section 4303 of USERRA[5] defines 16 terms used in this law. The term "position of employment" is not defined, but the term "employee" is defined as follows: "The term 'employee' means any person employed by an employer."[6] The term "employer" means:

> **(A)** Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--
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> **(i)** a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
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> **(ii)** the Federal Government;
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> **(iii)** a State;
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> **(iv)** any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and
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> **(v)** a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.
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> **(B)** In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.
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> **(C)** Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.
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> **(D)** (i) Whether the term "successor in interest" applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be

[4] 38 U.S.C. 4312(a) (emphasis supplied).
[5] 38 U.S.C. 4303.
[6] 38 U.S.C. 4303(3).

> determined on a case-by-case basis using a multi-factor test that considers the following factors:
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> **(I)** Substantial continuity of business operations.
> **(II)** Use of the same or similar facilities.
> **(III)** Continuity of work force.
> **(IV)** Similarity of jobs and working conditions.
> **(V)** Similarity of supervisory personnel.
> **(VI)** Similarity of machinery, equipment, and production methods.
> **(VII)** Similarity of products or services.
> **(ii)** The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i).[7]

In Law Review 99 (December 2003), I wrote:

> USERRA applies to the relationship between an employer and employees. It does not apply to the relationship among partners in a partnership. … I have heard from several lawyers, as well as physicians and dentists, with this issue. USERRA certainly applies to the relationship between a law firm and its junior attorneys, who are called "associates." I have heard from one ROA member who is referred to as a "non-equity partner" at his law firm. It seems to me that the phrase "non-equity partner" is an oxymoron. If you do not have an ownership interest in the firm, you are not a partner, just a better-paid associate. I am prepared to argue that this "non-equity partner" has reemployment rights at the law firm when he is released from active duty.

As I have discussed in Law Review 10053 (June 2010) and Law Review 12039 (April 2012), the issue of distinguishing "employees" from "independent contractors" is addressed in USERRA's legislative history and has arisen in at least one USERRA court decision. The point is that a bona fide independent contractor does not have rights under USERRA but labeling a person an independent contractor is not enough to make that person an independent contractor. Courts look to a series of factors when drawing the line between employees (who are protected by employment discrimination laws) and independent contractors (who are not protected).

A very similar rule applies in distinguishing between employees and partners. A bona fide partner does not have rights under USERRA and other employment laws, but labels are not controlling. The First Circuit[8] has addressed this distinction as follows:

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[7] 38 U.S.C. 4303(4).

[8] The United States Court of Appeals for the First Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

Having determined that federal law controls the question of the appellant's status, we turn next to an analysis of those attributes of a partner's relationship to the partnership which may influence the decisional calculus. In this endeavor, we do not write on a pristine page. Two other courts of appeals have tried their hands at plotting the line which divides partners who may be treated as employees under federal antidiscrimination statutes from those who may not.

In Simpson, the Sixth Circuit considered the status for ADEA purposes of an individual denominated a partner by an international accounting firm. In attempting to ascertain whether the plaintiff, notwithstanding his title, qualified as a person protected by the ADEA, the court weighed factors such as:

the right and duty to participate in management; the right and duty to act as an agent of other partners; exposure to liability; the fiduciary relationship among partners . . . participation in profits and losses; investment in the firm; partial ownership of firm assets; voting rights; the aggrieved individual's ability to control and operate the business; the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; the extent of that individual's employment security; and other similar indicia of ownership.

Simpson, 100 F.3d at 443-44. Concluding that the plaintiff more closely resembled an employee than a proprietor -- the court noted particularly that the plaintiff had no right either to participate in the partnership's management decisions or to vote for those who did, and that his compensation was not determined on the basis of the firm's profits -- the court allowed the plaintiff to sue under the ADEA. *See id.* at 441-43.

The Tenth Circuit grappled with the same sort of conundrum in *Wheeler*, a case which also involved a partner in an accounting firm. In determining that the plaintiff was not an employee for purposes of either Title VII or the ADEA, the *Wheeler* court focused on her participation in firm profits and losses, her exposure to liability, her investment in the firm, and her voting rights under [**23] the partnership agreement. *See Wheeler*, 825 F.2d at 276.

Other cases, though not involving partnerships, are useful in our analysis. In *Devine*, for example, the Eighth Circuit, in deciding whether attorneys who were shareholders and directors in a professional services corporation were employees for Title VII purposes, stated that courts should "look to the extent to which [the attorneys] manage and own the business." *Devine*, 100 F.3d at 81. The court proceeded to consider factors such as the attorneys' ability to participate in setting firm policy, the extent of their contributions **[*990]** to firm capital, their liability for firm debts, and the correlation (or lack of correlation) between their compensation and the firm's profits. *See id.*

In a comparable situation, the Eleventh Circuit evaluated the ADEA claim of a member-shareholder of an accounting firm by weighing elements such as the plaintiff's ability to share in firm profits and whether his compensation was a function of those profits; the plaintiff's liability for the firm's losses, debts, and obligations; and the extent of the plaintiff's right to vote on major firm decisions. *See Fountain*, 925 F.2d at 1401. [**24] The court dismissed an assertion that the "autocratic" actions of the firm's president constituted a reasonable basis for concluding that the plaintiff was an employee. "Domination by an 'autocratic' partner over others is not uncommon and does not support a finding that the others are 'employees.'" *Id.*

We think that these cases provide valuable guidance concerning the factors which courts must consider in making status determinations under Title VII. In large, the critical attributes of proprietary status involve three broad, overlapping categories: ownership, remuneration, and management. Within these categories, emphasis will vary depending on the circumstances of particular cases. Nonetheless, although myriad factors may influence a court's ultimate decision in a given case, we recount a non-exclusive list of factors that frequently will bear upon such determinations.

Under the first category, relevant factors include investment in the firm, ownership of firm assets, and liability for firm debts and obligations. To the extent that these factors exist, they indicate a proprietary role; to the extent that they do not exist, they indicate a status more akin to that of an employee.

Under the second category, the most relevant factor is whether (and if so, to what extent) the individual's compensation is based on the firm's profits. To the extent that a partner's remuneration is subject to the vagaries of the firm's economic fortunes, her status more closely resembles that of a proprietor; conversely, to the extent that a partner is paid on a straight salary basis, the argument for treating her as an ordinary employee will gain strength. A second potentially relevant factor in this regard relates to fringe benefits. An individual who receives benefits of a kind or in an amount markedly more generous than similarly situated employees who possess no ownership interest is more likely to be a proprietor.

Under the third category, relevant factors include the right to engage in policymaking; participation in, and voting power with regard to, firm governance; the ability to assign work and to direct the activities of employees within the firm; and the ability to act for the firm and its principals. Once again, to the extent that these factors exist, they indicate a proprietary role.

We add a note of caution. Status determinations are necessarily made along a continuum. The cases that lie at the polar extremes will prove easy to resolve. The close cases, however, will require a concerned court to make a case-specific assessment of whether a

> particular situation is nearer to one end of the continuum or the other. In performing this assessment, no single factor should be accorded talismanic significance. Rather, a status determination under Title VII must be founded on the totality of the circumstances which pertain in a particular case. Given these verities, any effort to formulate a hard-and-fast rule would likely result in a statement that was overly simplistic, or too general to be of any real help, or both.[9]

An excellent law review article about applying Title VII[10] to law firms and other partnerships states:

> Only within the last fifteen years have courts recognized that a partner can be an employee. Before that time, courts automatically considered partners to be employers, merely because of their "partner" title. This inability of partners to sue their own partnership under Title VII has been called the "Title VII gap." Because of this gap, countless numbers of women who have been subject to discrimination have been denied legal recourse. Today, courts consider the possibility that a woman partner is an employee, but until courts engage in a uniform inquiry into the nature of partnership relationships, women partners will continue to be denied the protection of Title VII *and other anti-discrimination laws.*
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> In early Title VII cases, courts recognized that the purpose of Title VII was to stop discrimination in employment. In furthering that purpose courts must somehow recognize in a fair and consistent manner who is and is not an employee.[11]

The same can be said for protecting the civilian jobs of Reserve Component personnel, male and female. Courts must not give undue weight to the label of "partner" and must permit lawsuits against partnerships and other entities that violate USERRA.

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[9] *Serapion v. Martinez,* 119 F.3d 982, 989-90 (1st Cir. 1997), *cert. denied,* 522 U.S. 1047 (1998).

[10] Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of race, color, sex, religion, or national origin.

[11] Dawn S. Sherman, "Partners Suing the Partnership: Are Courts Correctly Deciding Who Is and Employer and Who Is an Employee under Title VII?", 6 William & Mary Journal of Women and the Law 645, 645-46 (2000). http://scholarship.law.wm.edu/wmjowl/vol6/iss3/5.