

LAW REVIEW¹ 19003

January 2019

In a Lawsuit, you Don't Get a Mulligan

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 Lieutenant Colonel in the Marine Corps Reserve and a life member of the Reserve Organization of America.³ I was a federal civilian employee for 15 years until three years ago,

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 amended its Constitution to make all service members (E-1 through O-10) eligible for membership and 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

when I was fired. For the entire time I worked for that federal agency, I had a very difficult relationship with my immediate supervisor and his supervisor, concerning my Marine Corps Reserve service and the work days that I missed because of that service. These two supervisors, who have never served our country in uniform, continuously harassed me about “playing soldier” in the Marine Corps Reserve and several times contacted my Marine Corps superiors and lied about me, accusing me of various misconduct.

I am convinced that the 2015 decision to fire me was motivated by my Marine Corps Reserve service, and I appealed the firing to the Merit Systems Protection Board (MSPB). The Administrative Judge (AJ) of the MSPB let my former supervisors get away with perjury, lying about the reasons for firing me. I appealed to the MSPB itself, and the Board summarily affirmed the AJ’s decision without even listening to my side of the story. I appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the MSPB decision without conducting oral argument and without even writing a decision. I appealed to the Supreme Court, which refused to hear my case.⁴

After the Supreme Court refused to hear my case, I fired my lawyer and filed a new suit against my former employer and two former supervisors in the United States District Court for the Eastern District of Virginia, in Alexandria. The District Judge dismissed my case for “want of jurisdiction” without even considering the merits. I have appealed to the United States Court of Appeals for the Fourth Circuit, in Richmond. I want ROA to help me in the Fourth Circuit, by filing an amicus curiae (friend of the court) brief urging that court to hear my case and rule in my favor. Help!

A: During the six years that I was the Director of the Service Members Law Center (SMLC), from June 2009 through May 2015, I drafted and filed several amicus curiae briefs in the Supreme Court and other courts. In the almost four years since my paid ROA employment ended, I have continued (as a volunteer) some of the functions of the SMLC, including writing new “Law Review” articles.⁵ I am no longer available to draft and file briefs.

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 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.

⁴ In the federal court system, when you lose in the Court of Appeals (either the Federal Circuit or any other Circuit), your final step is to apply to the Supreme Court for a writ of certiorari. Certiorari is granted if at least four of the nine Justices vote for certiorari at a conference to consider certiorari petitions. If three or fewer Justices vote for certiorari, the decision of the Court of Appeals becomes final. Certiorari is denied in more than 99% of the cases where it is sought.

⁵ We added 127 new articles in 2016, 127 in 2017, and 112 in 2018.

Moreover, even if you were offering to pay me to represent you or to file a brief on your behalf, I would have to turn you down. As an attorney, I have a duty under Rule 11 of the Federal Rules of Civil Procedure to refrain from filing frivolous briefs or appeals. The District Judge's decision to dismiss your case was clearly correct, for two reasons. There is no reasonable argument to make on your behalf.

First, the District Court has no jurisdiction to hear and adjudicate claims that federal agencies, as employers, have violated USERRA. Under section 4323 of USERRA,⁶ the federal district courts adjudicate USERRA cases against state and local governments and private employers. Under section 4324,⁷ the MSPB adjudicates USERRA claims against federal executive agencies, as employers. The first question that a judge should ask in any civil case is "Do I have jurisdiction?" If the answer is no, the judge's duty is to dismiss the case without considering the merits. Second, the United States District Court for the Eastern District of Virginia was required to dismiss your case because of the doctrine of res judicata.⁸

USERRA is a great law, but USERRA plaintiffs and USERRA cases are not exempted from rules like res judicata that apply to civil cases generally. Thank you for your service to our country in the Marine Corps and thank you for your membership in ROA. I regret that that there is nothing that we can do for you in your dispute with your former employer.

⁶ 38 U.S.C. 4323.

⁷ 38 U.S.C. 4324.

⁸ Res judicata is Latin for "the thing has been adjudicated." When the Supreme Court denied certiorari in your case, the case was *over*, and you lost. You are precluded from challenging again the lawfulness of the firing, in the same forum (the MSPB) or a different forum (district court), under USERRA or under some other legal theory. Every lawsuit must come to an end at some point, and your lawsuit ended when the Supreme Court refused to hear your case.