

## LAW REVIEW<sup>1</sup> 19030

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### USERRA Protects Absence from Civilian Job for Examination To Determine Fitness To Serve

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[Update on Sam Wright](#)

1.1.3.7—USERRA applies to an examination to determine fitness

1.3.1.1—Left job for service and gave prior notice

**Q: I am a Corporal (E-4) in the Marine Corps Reserve (USMCR) and a member of the Reserve Organization of America.<sup>3</sup> I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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](mailto:SWright@roa.org).

<sup>3</sup> 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

**On the civilian side, I work for a major international corporation—let's call it Daddy Warbucks Industries of DWI. My DWI supervisor continually harasses me about my occasional absences from work to perform training and other duty in the USMCR.**

**Almost a year ago, I seriously injured my knee while exercising with my fellow reservists on an obstacle course, during our USMCR drill weekend. My injury was determined to be “in the line of duty.” Over a period of many months, I received medical treatment, including surgery and physical rehabilitation, at a Navy hospital, and that required several periods of absence from my DWI job. Finally, I recovered from the injury, and I was ordered to appear for one last appointment at the Navy hospital, for a “fitness for duty” examination. The Navy physician found me fit for duty, and this past weekend I returned to my USMCR unit for a drill weekend for the first time in almost a year.**

**DWI tolerated all my absences from work for medical treatment, but they drew the line at the day that I needed to be away from work for the “fit for duty” examination. When I asked my DWI supervisor for that day off, even without pay, he told me that my request was denied and that if I missed work on that day I would be fired. I missed work that day and obeyed the USMCR order to report for the physical examination. The DWI supervisor fired me, and the DWI personnel department backed him up. I am now unemployed.**

**Did firing me for missing work to obey a USMCR order to show up for a physical examination violate USERRA?**

**A:** Yes.

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you (or any service member or veteran) have the rights to reemployment after a period of uniformed service if you meet five simple conditions:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform uniformed service, as defined by USERRA.
- b. You must have given the employer prior oral or written notice.

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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 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.

- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service with respect to the employer relationship for which you seek reemployment.<sup>4</sup>
- d. You must have served honorably—that is, you must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>5</sup>
- e. After release from the period of service, you must have been timely in reporting back to work or applying for reemployment.<sup>6</sup>

Section 4303 of USERRA<sup>7</sup> defines 16 terms used in this law. The phrase “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.<sup>8</sup>

USERRA’s definition of “service in the uniformed services” expressly includes military fitness examinations, like your examination. Thus, you left your DWI job to perform uniformed service. It is also clear that you did not receive a disqualifying bad discharge from the Marine Corps. If you gave DWI prior oral or written notice, and if you were timely in reporting back to work after release from the examination, you met the five conditions and you were entitled to reinstatement in your DWI job. Firing you or denying you reinstatement violated USERRA.

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<sup>4</sup> There are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count.

<sup>5</sup> Disqualifying bad discharges include punitive discharges (awarded by court martial) and other-than-honorable administrative discharges.

<sup>6</sup> After an examination to determine fitness or a period of service lasting fewer than 31 days, you must report back to work at the start of the first full regularly scheduled work period on the first day after release from the period of service or examination, the time reasonably required for safe transportation from the place of service or examination to your residence, plus eight hours for rest. 38 U.S.C. 4312(e)(1)(A) and (B). After a period of service of 31-180 days, you must apply for reemployment within 14 days after your release from service. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, you must apply for reemployment within 90 days after release. 38 U.S.C. 4312(e)(1)(D).

<sup>7</sup> 38 U.S.C. 4303.

<sup>8</sup> 38 U.S.C. 4303(13) (emphasis supplied).