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USERRA Precludes Employer-Initiated Lawsuits

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

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Q: My wife and I own and operate a small diner in Virginia. We have 12 employees, including a waiter—let's call him Nathan Hale. Hale recently told me that he had enlisted in the Army and will be reporting to basic training in about six months—the exact date is uncertain. He told me that he will be on active duty for at least four years and likely longer and that it is

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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.

likely that he will make the Army his career. He also told me that if he leaves active duty and applies for reemployment, we will be obligated to reemploy him, even if that means displacing another employee who has been hired in the meantime. He referred to something he called "You Sarah." What is this about?

A: Hale is referring to the Uniformed Services Employment and Reemployment Rights Act (USERRA), which was enacted in 1994 as a long-overdue replacement of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. For almost 80 years, federal law has accorded those who leave civilian jobs to serve our country in uniform, voluntarily or involuntarily, the right to reemployment after leaving active duty. Hale will have the right to reemployment at the diner if he meets USERRA's five simple conditions:

1. He must have left a job (federal, state, local, or private sector) to perform service in the uniformed services. That is exactly what Hale is doing.
2. He must have given the employer prior oral or written notice. He has already given you such notice.
3. He must not have exceeded the cumulative five-year limit on the duration of his period or periods of uniformed service. As I have explained in detail in Law Review 16043 (May 2016), the limit is cumulative with respect to the employer relationship for which the person seeks reemployment, and there are nine exemptions—kinds of service that do not count toward the person's five-year limit. If Hale is on active duty for more than five years, he will not have the right to reemployment unless part of his service is exempt.
4. He must have been released from the period of service without having received a disqualifying bad discharge from the military.[3]
5. He must have made a timely application for reemployment after release from the period of service.[4]

Q: My brother-in-law is a lawyer, and he told me that if we don't have at least 15 employees we are exempt from the federal laws governing the relationship between employers and employees. We have never had more than 14 employees. We have chosen to keep our diner small to avoid federal complications. What gives?

A: It is true that other federal employment laws (Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, etc.) have a 15-employee threshold for applicability, but the federal reemployment statute has never had such a threshold. USERRA's legislative history includes the following statement: "This chapter

[3] 38 U.S.C. 4304. This citation refers to title 38, United States Code, section 4304. Disqualifying bad discharges include punitive discharges awarded by court-martial and other-than-honorable administrative discharges.
[4] After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[USERRA] would apply, as does current law, to all employers regardless of the size of the employer or the number of employees. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992)."[5]

Dr. Richard B. Swint owned and lived on a ranch and had one employee, live-in ranch hand James G. Cole. In 1986, Cole enlisted in the Army National Guard and left his job for Army basic training. He completed the training and became a traditional National Guard member. He applied for reemployment, but Dr. Swint turned him down. With the assistance of the United States Department of Labor (DOL) and Department of Justice (DOJ), Cole sued Swint in the United States District Court for the Northern District of Texas. Cole won, and Swint appealed to the United States Court of Appeals for the 5th Circuit.[6]

In the district court and the appellate court, Swint argued that the VRRA did not apply to "casual" employers like himself and that he was not required to reemploy Cole because he had hired another employee to fill the position. The 5th Circuit firmly rejected both arguments, as follows:

> Swint argues that he had no duty to reemploy Cole because it would be unreasonable and impossible to do so. An employer may be excused from the duty to rehire where "the employer's circumstances have so changed as to make it impossible or unreasonable" to rehire the reservist. 38 U.S.C. 2021(a)(1)(B).[7] Swint argues that the fact that he had already hired someone else to take Cole's place living on the ranch was a change in circumstances exempted under the Act. This argument was without merit. The purpose of the exemption is to allow employers who have eliminated a reservist's position or otherwise drastically changed their business to avoid rehiring someone for a job that no longer exists. If mere replacement of the employee would exempt an employer from the Act, its protections would be meaningless.
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> Swint argues that the Act does not apply to small or "casual" employers. The Act does not have a threshold business size for coverage, unlike many other acts. … Swint offers no support for this argument other than those already asserted in his argument about the impossibility of reemploying Cole. We see no need to imply a restriction on the Act's coverage based on business size.[8]

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[5] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1). This is the comprehensive report of the House Committee on Veterans Affairs. The report is reprinted in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted passage can be found on page 705 of the 2018 edition of the *Manual.*

[6] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

[7] This citation is to the 1988 edition of the United States Code, before the enactment of USERRA in 1994.

[8] *Cole,* 961 F.2d at 60.

Q: I spoke to a volunteer for a Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR). She told me that USERRA applies to members of the National Guard or Reserve, not members of the Active Component of the military. Hale enlisted in the Army, not the Army Reserve or Army National Guard. How can Hale have rights under USERRA?

A: The ESGR volunteer you spoke to was wrong. ESGR's mission is to support National Guard and Reserve personnel, but the federal reemployment statute has always applied to service in the Active Component of the armed forces.[9]

Q: I asked Hale to tell me when or even if he will be returning to this area and seeking reemployment, but he refused to say. How am I supposed to hold a job open for this guy when I don't know when or even if he will be returning?

A: Hale is not required to give you any assurance that he will return. The pertinent section of the DOL USERRA regulation is as follows:

> **Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?**
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> No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.[10]

You are not required to hold Hale's position open, but if he meets the five USERRA conditions, including making a timely application for reemployment, you are required to reemploy him even if that means that you must displace another employee. If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that the returning veteran's right to prompt reemployment upon returning

[9] Please see Law Review 0719 (May 2007) and Law Review 17112 (November 2017).
[10] 20 C.F.R. 1002.88 (bold question in original).

from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit[11] has held:

> Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that "the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.[12]

The United States Court of Appeals for the Federal Circuit[13] has held:

> The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols' [Nichols was the returning veteran and plaintiff] former position was "unavailable" because it was occupied by another and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[14]

Q: My wife and I want to initiate a lawsuit against Hale, seeking a declaratory judgment that he will not have the right to reemployment if and when he returns and seeks reemployment. What do you say about that?

A: USERRA explicitly precludes employer-initiated lawsuits: "An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1)."[15] USERRA's legislative history explains the purpose and effect of this provision as follows: "Section 4322(d)(5) [later renumbered as 4323(f)] would provide that only persons claiming rights or benefits under chapter 43 may

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[11] The 1st 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.

[12] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49, 55-56 (1st Cir. 2013).

[13] The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

[14] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite the reader's attention to *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln St. Louis,* 702 F.2d 698 (8th Cir. 1983); *Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981).

[15] 38 U.S.C. 4323(f).

initiate an action, i.e., no declaratory judgment actions by employers, prospective employers, or other entities (such as pension plans or unions) can be filed."[16]

Q: It is just not fair. My wife and I run a small business. Why should we have to bear the cost of defending our country? We pay our taxes, and we should not be required to do any more.

A: What is asked of you, as an employer, is tiny as compared to what modern day patriots like your employee Nathan Hale have voluntarily assumed to do. It has now been almost two generations since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973. Those who are considering enlistment today have never faced the prospect of being drafted, and neither have their parents. No one has been drafted by our country since the grandparents or great-grandparents of today's service members were of military age. Relying exclusively on volunteers, our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that it is never necessary for our country to reinstate the draft.

Defending our country in a dangerous world, without relying on compulsion to fill the ranks, means that our nation must maximize the incentives and minimize the disincentives to military service in the Active Component, the Reserve, and the National Guard. Most of the 1700 articles in our "Law Review" series[17] address laws that seek to minimize the disincentives to service. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the concerns of the service member or potential service member that he or she will lose out on civilian job opportunities because of service to our country in uniform or that he or she will be unemployed after returning from four or five years of honorable military service.

I invite the reader's attention to Law Review 14080 (July 2014), by Nathan Richardson[18] and myself. In that article we wrote:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country in the armed forces. In the All-Volunteer Military recruiting is a constant challenge. Despite our country's current [2014] economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.

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[16] House Committee Report, April 28, 1993, H.R. Rep. No. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli. The quoted sentence can be found on page 729 of the 2018 edition of the *Manual.*

[17] Please see footnote 1.

[18] At the time (summer 2014), Nathan Richardson was an unpaid summer intern at the Service Members Law Center, of which I was the Director. Nathan is now a lawyer in New York City.

> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicines for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).
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> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service will make them unemployable in civilian life. There definitely is a compelling interest in the enforcement of USERRA.

As Nathan Richardson and I predicted in 2014, the services (and especially the Army) have suffered from recruiting shortfalls as the economy has improved and as President Trump has sought to reverse the military personnel strength reductions imposed by President Obama. As I reported in Law Review 18013 (October 2018), the Army fell short of its Fiscal Year 2018[19] recruiting goals for the Active Component, the Army Reserve, and the Army National Guard.

While I am very glad that Congress abolished the draft 46 years ago, I also think that conscription is constitutional, justified, and necessary when our nation is unable to recruit enough volunteers. In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

> It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.[20]

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early

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[19] Fiscal Year 2018 ended 9/30/2018.

[20] Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.

20th Century) and by drafting young men into military service.[21] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[22]

No one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 18th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, Active Component (AC) and Reserve Component (RC), have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the

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[21] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

[22] *Arver v. United States,* 245 U.S. 366 (1918). The citation means that you can find this decision in Volume 245 of *United States Reports,* starting on page 366.

> tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 18 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 46 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor.

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren. You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.