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Am I Required To Exhaust Remedies through the Union Agreement before I Sue my Employer For Violating USERRA? No

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Update on Sam Wright

1.3.2.10—Furlough or leave of absence clause
1.4—USERRA enforcement
1.5—USERRA arbitration
1.8—Relationship between USERRA and other laws/policies

Q: I am a Major in the Air National Guard and a member of the Reserve Organization of America.[3] I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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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 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

On the civilian side, I am a first officer (co-pilot) for a major airline—let's call it Very Big Air Line or VBAL. I am particularly interested in your Law Review 19026 (February 2019), about the recently filed case of *Huntsman v. Southwest Airlines,* pending in the United States District Court for the Northern District of California. In that article, you reported that Southwest Airlines (SWA) pilot Jayson Huntsman has sued SWA, claiming that the airline is required to pay him and other SWA pilots who are Reserve or National Guard members for their short periods of uniformed service (like drill weekends). You reported that SWA pays pilots for hours they do not work because of jury duty leave, bereavement leave, sick leave, and other forms of non-military leave. You reported that Huntsman and his attorneys are arguing that because SWA pays pilots for these other forms of non-military leave, it must pay pilots who are away from work for comparable short periods of military leave, under USERRA's "furlough or leave of absence clause."[4] In your article, you indicated that you agree with the argument that Huntsman and his lawyers are making.

At VBAL, as at SWA, pilots who are away from work for jury duty leave, bereavement leave, sick leave, and other forms of non-military leave are paid for these short periods of absence from their airline jobs. I believe that VBAL pilots who are away from their jobs for comparable periods of military leave should be treated no less generously than pilots who are away from work for non-military reasons. Thus, I would argue, these VBAL pilots who are away from work for drill weekends or other short periods of military leave should be paid by the airline for these short periods.

I provided a copy of your Law Review 19026 to the VBAL personnel office and to my union, the VBAL Pilots Association (VBALPA). Both the union and the employer have insisted that I must file a grievance with the union, rather than filing suit in federal court or filing a USERRA complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). What do you think? And what is the relationship between USERRA and the collective bargaining agreement (CBA) between VBAL and the VBALA?

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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 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] 38 U.S.C. 4316(b).

A: USERRA is a floor and not a ceiling on the rights and benefits of those who serve or have served our country in uniform. Section 4302 provides:

> **(a)** Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
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> **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[5]

Thus, the CBA between VBAL and the VBALPA can give you greater and additional rights, over and above USERRA, but the CBA cannot take away rights that Congress gave you by enacting USERRA. Similarly, the CBA, or the employer and the union together, cannot impose an additional prerequisite on the exercise of USERRA rights or the enjoyment of USERRA benefits. USERRA sets forth the conditions that you must meet for these rights and benefits. The union and employer together cannot impose additional conditions.

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue update of and improvement upon the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the VRRA, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act."[6] Section 4302(b) of USERRA restates this fundamental principle of the federal reemployment statute.

There have been 17 Supreme Court cases under the federal reemployment statute.[7] In 13 of those cases,[8] the Supreme Court (and the lower courts) reviewed the interplay between the CBA and the reemployment law. In these cases, the veteran was pitted against his own union, which favored the interests of most workers who did not serve our country in uniform over the statutory rights of the minority who interrupted their civilian careers to answer the country's

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[5] 38 U.S.C. 4302.

[6] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).

[7] Please see Category 10.1 in our Subject Index. You will find a case note about each of these cases.

[8] *Coffy v. Republic Steel Corp.,* 447 U.S. 191 (1980); *Foster v. Dravo Corp.,* 420 U.S. 92 (1975); *Eagar v. Magma Copper Co.,* 389 U.S. 323 (1967); *Accardi v. Pennsylvania Railroad Co.,* 383 U.S. 225 (1966); *Brooks v. Missouri Pacific Railroad Co.,* 376 U.S. 182 (1964); *Tilton v. Missouri Pacific Railroad Co.,* 376 U.S. 169 (1964); *McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265 (1958); *Diehl v. Lehigh Valley Railroad Co.,* 348 U.S. 960 (1955); *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Oakley v. Louisville & Nashville Railroad Co.,* 338 U.S. 278 (1949); *Aeronautical District Lodge 727 v. Campbell,* 337 U.S. 521 (1949); *Trailmobile Corp. v. Whirls,* 331 U.S. 40 (1947); *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946).

call.[9] In deciding a case like yours, the court will be required to review the CBA to determine how the employer treats other employees who are away from work for comparable periods of time for non-military reasons (jury duty, illness, etc.). The CBA is certainly relevant to your case, but your case arises under USERRA, not under the CBA.

USERRA's legislative history addresses the purpose and effect of section 4302 as follows:

> Section 4302(a) would reaffirm that, to the extent that a federal or state law or employer plan or practice provides greater rights than those provided by the Committee [House Committee on Veterans Affairs] bill, those greater rights would not be preempted by chapter 43.
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> Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, *as well as employer practices and agreements,* which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department of the City of New York,* 675 F. Supp. 847 (S.D.N.Y. 1987) and *Fishgold, supra,* 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43. *Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. See McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265, 270 (1958); *Beckley v. Lipe-Rollway Corp.,* 448 F. Supp. 563, 567 (N.D.N.Y. 1978). *It is the Committee's intent that, even if a person protected by the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. See Kidder v. Eastern Airlines, Inc.,* 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).[10]

In reversing a district court decision holding that a USERRA plaintiff was not bound by an agreement to arbitrate that he had acceded to years before the USERRA dispute arose, the 5th Circuit[11] minimized the import of the "snippet of legislative history" quoted above and granted the employer's motion to compel arbitration.[12] Nonetheless, I believe that *Kidder* is still good law in the context of a collective bargaining agreement that provides for binding arbitration of disputes arising under the agreement. Under *Garrett* and its progeny, an individual employee

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[9] Airline pilot unions like VBALPA tend to be much more supportive of the rights of service members and veterans than unions generally. In a union of airline pilots, the great majority of the members are veterans, and a substantial minority are serving or have served in the National Guard or Reserve.

[10] 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 and Edward Still. The quoted paragraphs can be found on page 703 of the 2018 edition of the *Manual.*

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

[12] *See Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672, 679-80 (5th Cir. 2006).

can effectively waive his or her right to a federal court determination of future USERRA claims, but the employee's union cannot waive this right for the employee.

As I explained in detail in Law Review 17068 (June 2017), the definitive reference on USERRA is *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. In their book, they address this issue as follows:

> Characterizing the House Report's interpretation of section 4302(b) as a mere "snippet of legislative history," the Fifth Circuit declined to find the House Report confirmed congressional intent to forbid resort to binding arbitration. The court said the totality of the House Report's language addressing arbitration instead suggested Congress intended section 4302(b) only to prohibit limiting USERRA's substantive rights by union contracts and collective bargaining agreements.[13]

Because your claim for pay for short periods of military leave arises under USERRA, not the CBA, you can bring that claim in federal district court.

Q: The CBA between the VBALPA (my union) and the airline also provides some rights for Reserve and National Guard personnel that are *over and above USERRA.* If I am asserting such "over and above" rights, can I make that claim in federal district court?

A: No. If your claim rests on the CBA rather than the statute, you must utilize the enforcement mechanism provided by the CBA. The mechanism starts with filing a grievance through your union.

[13] *The USERRA Manual,* section 8:15, page 452 (2018 edition).