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How Do I Get Free DOJ Representation for my USERRA Claim?

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

1.2—USERRA forbids discrimination
1.4—USERRA enforcement

Q: I am a Lieutenant Colonel in the Army National Guard and a member of the Reserve Organization of America.[3] On the civilian side, I am a mid-level executive for a major

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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. 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 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

corporation—let's call it Daddy Warbucks Industries or DWI. I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 19039 (April 2019).

I recently applied for an internal promotion opportunity at DWI. I was one of 30 applicants and one of five applicants interviewed by a panel of senior DWI officials. During the interview, two of the three senior officials on the panel asked me pointed questions about my National Guard service, including asking me about the likelihood that I would be recalled to active duty or that I would volunteer and asking me when I will be eligible to retire from the National Guard and whether I would be willing to retire from the Guard if I am selected for the promotion.

Among the five applicants considered for the promotion, I am the only one who has ever served a day in uniform. The three panel members are also non-veterans. I think that I was, by far, the best qualified of the applicants, but I was not selected. Do you think that I have a USERRA claim against DWI?

In Law Review 19039 (April 2019), you discussed a recent case in which the United States Department of Justice (DOJ) represented an Army Reservist in his USERRA claim against an employer. Thus, the claimant avoided having to pay anything for attorney fees or court costs. How do I get DOJ to represent me for free?

A—Substantive merit of your USERRA claim:

Under section 4311 of USERRA,[4] it is unlawful for an employer (federal, state, local, or private sector) to deny a service member or veteran a promotion (as well as other things) because of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, a person who was drafted or who voluntarily enlisted in the armed forces was entitled to reemployment in the pre-service civilian job after honorable service. In 1955 and 1960, Congress expanded the VRRA to apply also to

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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. 4311.

initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard members.

When leaving a job for service and returning to the job became a recurring phenomenon rather than a once-in-a-lifetime experience, Congress amended the VRRA in 1968, adding a provision making it unlawful for an employer to fire a Reserve Component service member or to deny such a person promotions or "incidents or advantages of employment" based on "any obligation as a member of a Reserve Component of the Armed Forces." In 1986, Congress amended this provision to forbid discrimination in hiring.

The VRRA only forbade discrimination based on "any obligation as a member of a Reserve Component of the armed forces." USERRA's anti-discrimination provision is much broader. It forbids the denial of initial employment, retention in employment, promotion, or a benefit of employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.[5]

Just prior to the enactment of USERRA in 1994, the pertinent section of the VRRA read as follows:

> Any person who seeks or holds a position described in clause (A) [a position with the United States Government, any territory or possession of the United States or a political subdivision of a territory or possession, or the Government of the District of Columbia] or (B) [a state, a political subdivision of a state, or a private employer] of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment *because of any obligation as a member of a Reserve component of the Armed Forces.*[6]

USERRA (enacted in 1994) contains a much broader and stronger anti-discrimination provision, as follows:

> § 4311. **Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited**

- **(a)** A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership,

[5] 38 U.S.C. 4311(a).
[6] 38 U.S.C. 2021(b)(3) (1988 edition of the United States Code) (emphasis supplied).

application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

- **(c)** An employer shall be considered to have engaged in actions prohibited--
  - **(1)** under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
  - **(2)** under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

- **(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[7]

Section 2021(b)(3) of the VRRA forbade discrimination by employers only if such discrimination was "because of any obligation as a member of a Reserve component of the Armed Forces." Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

a. Membership in a uniformed service.[8]

[7] 38 U.S.C. 4311 (emphasis supplied).

[8] As defined by USERRA, the uniformed services include the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS). 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is not a uniformed service for USERRA purposes, although it is a uniformed service as defined in 10 U.S.C. 101(a)(5). Please see Law Review 15002 (January 2015) for an explanation of how it came to pass that USERRA applies to the PHS Corps but not the NOAA Corps. Under more recent amendments, Intermittent Disaster Response Appointees of the National Disaster Medical System

b. Application to join a uniformed service.
c. Performing uniformed service.
d. Having performed uniformed service in the past.
e. Application to perform uniformed service.
f. Obligation to perform uniformed service.
g. Having taken an action to enforce a USERRA protection for any person.
h. Having testified or otherwise made a statement in or in connection with a USERRA proceeding.
i. Having assisted or otherwise participated in a USERRA investigation.
j. Having exercised a USERRA right.

Under section 4311(c) of USERRA,[9] it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It is enough to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves motivating factor, the *burden of proof shifts to the employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.*

USERRA's legislative history explains section 4311 as follows:

> Current law [the VRRA] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.
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> If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have

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under the cognizance of the Department of Health and Human Services and persons who serve in the National Urban Search and Rescue Response System under the cognizance of the Federal Emergency Management Agency in the Department of Homeland Security have reemployment rights under USERRA. Please see Law Review 17011 (February 2017).

[9] 38 U.S.C. 4311(c).

continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.

Section 4311(b) [now 4311(c), as amended in 1996] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) [later renumbered 4321(b)(3)] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Session at 5320 (February 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[10]

USERRA Regulations

Two sections of the Department of Labor (DOL) USERRA Regulations address how to prove a violation of section 4311:

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one

[10] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 665-66 of the 2016 edition of the *Manual.*

of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.[11]

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

- **(a)** In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
  - **(1)** Membership or application for membership in a uniformed service;
  - **(2)** Performance of service, application for service, or obligation for service in a uniformed service;
  - **(3)** Action taken to enforce a protection afforded any person under USERRA;
  - **(4)** Testimony or statement made in or in connection with a USERRA proceeding;
  - **(5)** Assistance or participation in a USERRA investigation; or,
  - **(6)** Exercise of a right provided for by USERRA.

- **(b)** If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.[12]

In summary, you need not prove that the DWI panel chose someone else instead of you for the promotion *solely because* of your uniformed service and obligation to perform future service. You are only required to prove that your protected activities listed in section 4311 constituted *a motivating factor* in the employer's decision to choose another candidate over you.

The fact that you were asked about your National Guard service during the interview is ample evidence that your service was a motivating factor in the employer's decision. If your service had been irrelevant to the decision on the promotion, the panel members would not have asked you about it. Thus, you should win your USERRA case unless DWI can *prove* (not just say) that you would not have been promoted even if you had not been a member of the Army National Guard.

A—Getting DOJ to represent you.

A person who claims that an employer (federal, state, local, or private sector) has violated the person's USERRA rights is permitted to file a formal, written USERRA complaint with the Veterans' Employment and
Training Service of the United States Department of Labor (DOL-VETS).[13] DOL-VETS is required to investigate any such complaint, and if the agency determines, in its investigation, that the

[11] 20 C.F.R. 1002.22 (bold question in original).
[12] 20 C.F.R. 1002.23 (bold question in original).
[13] 38 U.S.C. 4322(a). You can file the claim on-line at the DOL-VETS website, www.dol.gov/VETS.

complaint has merit it is to make "reasonable efforts" to get the employer to come into compliance with USERRA.[14]

If the DOL-VETS investigation does not result in resolution of the complaint, the agency is required to notify the complainant of the results of its investigation and of the complainant's options in the case.[15] After receiving that notice from DOL-VETS, the complainant can request (in effect, insist upon) the referral of the case file to DOJ.[16] If DOJ is reasonably satisfied that the complainant is entitled to the benefits that he or she seeks, DOJ may appear and act as attorney for the complainant in filing and prosecuting the case in federal court.[17] If DOJ decides not to represent the complainant, it must notify the complainant, in writing, of that decision.[18]

Q: How long should each of these steps take?

A: DOL-VETS is required to complete its investigation within 90 days after receiving the complaint.[19] After the complainant requests referral to DOJ, DOL-VETS must refer the case file within 60 days after receipt of the referral request.[20] Within 60 days after receiving the referral from DOL-VETS, DOJ must make a decision about representing the complainant and notify the complainant, in writing, of that decision.[21]

Q: If DOJ turns down my request for representation, am I permitted to retain my own lawyer and file suit in federal court?

A: Yes.[22] Also, when DOL-VETS notifies you of the results of its investigation, you can at that point retain private counsel and sue, instead of requesting that DOL-VETS refer the case to DOJ.[23]

Q: Is it possible for me to bypass DOL-VETS altogether and file suit in federal court?

A: Yes.[24] But if you want free legal representation from DOJ you must go through DOL-VETS.

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[14] 38 U.S.C. 4322(d).
[15] 38 U.S.C. 4322(e).
[16] 38 U.S.C. 4323(a)(1). This relates to cases alleging USERRA violations by state or local governments or private employers. I will discuss the enforcement mechanism in cases involving federal agencies as employers in Law Review 19040, the next article in this "Law Review" series.
[17] *Ibid.*
[18] 38 U.S.C. 4323(a)(2).
[19] 38 U.S.C. 4322(f).
[20] 38 U.S.C. 4323(a)(1).
[21] 38 U.S.C. 4323(a)(2).
[22] 38 U.S.C. 4323(a)(3)(C).
[23] 38 U.S.C. 4323(a)(3)(B).

[24] 38 U.S.C. 4323(a)(3)(A).

Q: If I file with DOL-VETS and that agency finds "no merit" is that determination admissible in court?

A: No. The DOL-VETS determination, for you or against you, is not admissible and will not be considered by the court. But as a practical matter, if DOL-VETS found "no merit" that may make it difficult for you to find a private lawyer willing to represent you on a contingent fee basis.

Q: If DOL-VETS finds merit and refers the case to DOJ with a positive recommendation, does that guarantee that DOJ will agree to represent me?

A: No. DOJ makes its own determination about agreeing to represent or declining to represent the complainant. I invite the reader's attention to Law Review 18070 (August 2018). DOJ declined to represent Brigadier General Dwayne Edwards in his claim against the University of Kentucky (his employer), although DOL-VETS found his claim to have merit. Major General Jeffrey Phillips, ROA's Executive Director, sent a letter to the Attorney General of the United States, asking him to review the determination to decline General Edwards' request for representation.[25] Unfortunately, DOJ persisted in its decision to decline to represent General Edwards.

Q: If DOL-VETS finds no merit, does that guarantee that DOJ will decline the request for representation?

A: No, but if the case file comes from DOL-VETS with a negative recommendation, it is most unlikely that DOJ will agree to represent the complainant.

Q: If I proceed with private counsel, is it possible for me to get the court to order the employer to pay my attorney fees?

A: Yes.[26]

Q: Is it possible for me to act as my own lawyer?

A: Yes, but I recommend against that course of action. A man who represents himself has a fool for a client.

Q: When DOJ represents the complainant, who is the named plaintiff?

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[25] Please see Law Review 18070 for a copy of the letter.
[26] 38 U.S.C. 4323(h)(2).

A: If the defendant employer is a state, the named plaintiff is the United States of America.[27] If the defendant is a political subdivision of a state or a private employer, the named plaintiff is the individual complainant.

Q: Why are political subdivisions of states treated differently from the states themselves?

A: "In this section [for purposes of USERRA enforcement], the term 'private employer' includes a political subdivision of a State."[28] Political subdivisions (local governments) are treated differently because they do not share the state's sovereign immunity under the 11th Amendment of the United States Constitution.[29]

Q: In "Law Review" articles like 07058 (November 2007) and 11081 (October 2011), you have been critical of DOL-VETS for doing shoddy USERRA investigations and for being too anxious to accept at face value legal and factual assertions made by employers and their attorneys. Do you stand by those criticisms?

A: I stand by the critical things that I have written about DOL-VETS and DOJ, but I also ask the reader to note that I have praised these agencies when they have done well. Please see Law Reviews 19038 (March 2019), 17081 (August 2017), 13126 (September 2013), 13031 (February 2013), 12069 (July 2012), 12040 (April 2012), 12032 (March 2012), and 12030 (March 2012).

DOL-VETS is led by the Assistant Secretary of Labor for Veterans' Employment and Training (who is appointed by the President with Senate confirmation) and the Deputy Assistant Secretary for Policy (who is appointed by the President but without a requirement for Senate confirmation). Both of those positions are currently vacant according to the DOL-VETS website.[30] I call upon the President and the Senate to fill these vacancies as soon as possible, and when these vacancies are filled, I will call upon the new officials to improve USERRA investigators and investigations.

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[27] 38 U.S.C. 4323(a)(1) (final sentence).
[28] 38 U.S.C. 4323(i).
[29] *Walker v. Jefferson County Board of Education,* 771 F.3d 748 (11th Cir. 2014); *Sandoval v. City of Chicago,* 560 F.3d 703, 704 (7th Cir.), *cert. denied,* 558 U.S. 874 (2009).
[30] www.dol.gov/vets.