

LAW REVIEW¹ 19048

May 2019

Applying USERRA to a Religious School Teacher

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[Update on Sam Wright](#)

1.1.1.3—Applying USERRA to religious institutions

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”³
***Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012).*⁴**

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 United States Constitution, Amendment 1 (emphasis supplied).

⁴ This is a 2012 decision of the United States Supreme Court. The citation means that you can find the decision in Volume 565 of *United States Reports*, starting on page 171. Chief Justice John Roberts wrote the decision, and all eight of his colleagues joined in a unanimous decision.

Q: I am a Captain in the Army Reserve and a member of the Reserve Organization of America.⁵ I have read with interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On the civilian side, I am an elementary school teacher for a church school. The church calls me a “minister”, but religious instruction makes up a small part of my work day—about 45 minutes of a seven-hour school day. I recently gave the headmaster of the school notice, orally and in writing, that I will be away from work for two weeks for my Army Reserve annual training. He told me that he will not give me leave, even without pay, for that purpose and that if I am away from work for even one day I will be fired. I told him that USERRA requires the school to give me military leave and to reinstate me when I return. He insisted that religious schools like his school are exempt from USERRA. Is he correct?

A: Unfortunately, he is correct, based on the important Supreme Court precedent cited above. Writing for a unanimous Court, Chief Justice Roberts wrote:

We [the Supreme Court] agree [with the 12 federal circuit courts that have addressed the question] that there is a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than an employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause [of the First Amendment], which protects a religious group’s right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.⁶

⁵ 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 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.

⁶ *Hosanna-Tabor*, 565 U.S. at 188-89.

Q: It is not like I am the minister of the congregation or even the headmaster of the school. My “religious” duties are peripheral, involving only about 45 minutes of a seven-hour school day. Allowing me to miss two weeks of school to attend my Army Reserve annual training certainly does not threaten the church’s “free exercise” of its religion.

A: None of that matters. In his decision, Chief Justice Roberts wrote:

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich [the teacher in the case before the Supreme Court], given all the circumstances of her employment.⁷

Although the Sixth Circuit did not adopt the extreme position pressed here by the EEOC, it did regard the relative amount of time Perich spent performing religious functions [only 45 minutes per school day] as largely dispositive. The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing the employee’s status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.⁸

I think that your situation, as you have described it, is indistinguishable from the situation of the teacher in the case before the Supreme Court. There is simply no way for you to prevail if you sue the school for violating USERRA.

Q: How about I get a private lawyer instead of relying on the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS) and the United States Department of Justice (DOJ)?

A: This binding Supreme Court precedent applies in the same way, without regard to whether you have private counsel or whether you are represented by DOL-VETS and DOJ. You can retain the finest lawyer in America, but he or she will not be able to get around *Hosanna-Tabor*.

Q: Will ROA support legislation to fix this issue?

A: There is no legislative solution. Getting around *Hosanna-Tabor* would require a constitutional amendment, and of course that is completely out of the question.

⁷ *Hosanna-Tabor*, 565 U.S. at 190.

⁸ *Hosanna-Tabor*, 565 U.S. at 193-94.

I suggest that if you want to continue your Army Reserve career you need to find a new job with a new employer—a public school or a private school that is not affiliated with a church, synagogue, mosque, or other religious institution.

Please join or support ROA

This article is one of 1800-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national defense needs.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002