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You Must Meet USERRA's Five Conditions for Reemployment to have the Right to an Accommodation for a Service-Connected Disability or the right to the Special Protection against Discharge

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Q: I am a disabled veteran and a medically retired Army officer. While in college (2010-14) I participated in the Army's Reserve Officers Training Corps (ROTC), and I was commissioned a Second Lieutenant upon graduation in May 2014. In 2015, I was deployed to Afghanistan and

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "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 1600 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 43 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.

wounded in action. I was retained on active duty another three years, for medical treatment and processing for a disability retirement. Finally, I left active duty with a disability retirement in March 2018.

I returned to my hometown and applied to the local school district for a teaching job. I was offered and I accepted a one-year contract as a “probationary” teacher, for the 2018-19 school year. During the school year, I had a running dispute with the principal of the school and the superintendent of the school district. Several times, I requested reasonable accommodations for my disability, but the principal and the superintendent insisted that the school district was under no obligation to make any such accommodations.

At the end of the 2018-19 school year, most probationary teachers were offered new contracts for the 2019-20 school year, but I was not offered a new contract. I asked for an explanation, and the district’s personnel department insisted that because of my status as “probationary” I am not entitled to any such explanation. The personnel department insisted that a probationary teacher can be terminated at the end of the school year for any reason or no reason and that the decision to terminate a probationary teacher is not appealable.

I have read some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I made copies of some of your articles for the school district’s personnel department and attorney, but they refused to read the articles and refused to reconsider the decision to terminate my employment relationship with the school district.

I then contacted the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS) and provided them the same articles that I had provided to the school district. The DOL-VETS employee that I spoke to insisted that the articles were “inapposite” and “distinguishable.” What do you think? Is DOL-VETS wrong to dismiss my USERRA claim out of hand?

Answer, bottom line up front

As I have explained in Law Review 16099 (September 2016) and other articles, I am not a fan of DOL-VETS, although I worked for DOL as an attorney for ten years (1982-92) and thereby developed an interest and expertise in the reemployment statute. All too often, DOL-VETS investigators conduct perfunctory investigations and accept at face value the factual and legal assertions of attorneys for employers, and close valid cases as “no merit.” *But your case is different, as I see it.* Even if we accept as truthful everything that you are saying, and I certainly have no reason to doubt your truthfulness, *the employer has not violated USERRA.* You may have rights under other laws, like the Americans with Disabilities Act (ADA) and your state’s veterans’ preference law, but not USERRA. The authority of DOL-VETS only applies to USERRA.

Explanation

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you (or any service member or veteran) must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.
- b. You must have given the employer prior oral or written notice that you were leaving the job to perform service.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.³
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁴
- e. After release from the period of service, you must have made a timely return to work or application for reemployment.⁵

You must meet all five of these conditions to have the right to reemployment under USERRA. You fail to meet the first condition—you did not leave a civilian job with this school district to go on active duty in 2010. Thus, you are not and were not entitled to reemployment with the school district.

USERRA's provision for special protection against discharge, except for cause, reads as follows:

(c) *A person who is reemployed by an employer* under this chapter shall not be discharged from such employment, except for cause--

- (1)** within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
- (2)** within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.⁶

³ Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions to the limit—that is, there are nine kinds of service that do not count toward exhausting your limit.

⁴ If you receive a punitive discharge by court martial or administrative discharge characterized as “other than honorable,” you will not have the right to reemployment. See 38 U.S.C. 4304.

⁵ After a period of service of 181 days or more, you have 90 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). After a period of service of 31-180 days, you have 14 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(C). After a continuous period of service of fewer than 31 days, you must report for work at the start of the first regularly-scheduled work period on the first day after your release from the period of service and the time reasonably required for safe transportation from the place of service to your residence plus eight hours (for rest) after your arrival at home. See 38 U.S.C. 4312(e)(1)(A). In determining the deadline for you to apply for reemployment, it is the *actual period of service*, not the expected period of service, that controls.

⁶ 38 U.S.C. 4316(c) (emphasis supplied).

The right to the special protection against discharge only applies to “a person who is reemployed by an employer under this chapter.” You were not reemployed, because you did not work for the school district when you entered active duty in 2010. This provision simply does not apply to your situation. Similarly, the right to insist that the employer make accommodations for a veteran with a service-connected disability only applies to the *reemployed* veteran.⁷ You do not qualify.

Q: What about USERRA’s prohibition on discrimination? I think that the school district discriminated against me because I am a disabled veteran. Doesn’t that sort of discrimination violate USERRA?

A: You are referring to section 4311 of USERRA, which reads 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, 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

⁷ 38 U.S.C. 4313(a)(3).

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.⁸

Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

- a. Membership in a uniformed service.⁹
- 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.

Section 4311 of USERRA does not make it unlawful for an employer to discriminate against an employee or prospective employee based on his or her status as a service-connected disabled veteran.¹⁰ You probably have legal rights, but not under USERRA.

Q: In Law Review 0850 (October 2008), you wrote that veterans with service-connected disabilities rated at 30% or more are entitled to ten “preference” points in obtaining civilian employment, under the federal Veterans’ Preference Act (VPA). My disability is rated at substantially more than 30%. Have my federal VPA rights been violated?

A: The federal VPA applies only to *federal* employment—it does not apply to employment by the states and their political subdivisions, including school districts. More than 40 states have

⁸ 38 U.S.C. 4311 (emphasis supplied).

⁹ 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 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).

¹⁰ See *Butts v. Prince William County School Board*, 844 F.3d 424 (4th Cir. 2016), cert. denied, 137 S. Ct. 2149 (2017). I discuss *Butts* in detail in Law Review 17073 (July 2017).

veterans' preference laws at the state level, governing employment by state and local governments. It is likely that your state has such a law, and it may give you enforceable rights. You need to seek legal advice from a lawyer in your state. To enforce your state law rights, you will likely need to sue in *state* court, not federal court.

Q: What is the Americans with Disabilities Act? How does that Act apply to my situation?

A: The Americans with Disabilities Act (ADA) is an important federal statute that was enacted in 1990 and substantially amended in 2008. It protects disabled persons from discrimination and gives them important access rights with respect to employers, facility managers, government programs, etc. It applies *without regard to the cause of a person's disability*. Thus, it applies to disabled veterans, as well as persons who are disabled as a result of birth defects, accidents, criminal assaults, etc.

Title I of the ADA applies to employment. This title forbids discrimination against employees or potential employees with disabilities and requires employers to make *reasonable accommodations* to enable disabled persons to apply and to fulfill the essential functions of a job. A reasonable accommodation is a change to equipment, schedule, or organization that does not impose an undue hardship on the employer. A demand for an accommodation that may be unreasonable for a small family-owned business is not necessarily unreasonable for a large national corporation.

Q: How do I initiate an ADA claim? What is the statute of limitations?

A: You must file a written complaint with the United States Equal Employment Opportunity Commission (EEOC) within 180 days after the employment action about which you complain. In your case, that would be the date that you learned that your teaching contract had not been extended to include the 2019-20 school year. In some states, a state agency administering a similar state law acts in the place of the EEOC in receiving and acting upon complaints. In that situation, the deadline for filing the claim is 300 days after the employment action.

The EEOC or the state agency will conduct "conciliation" to try to resolve the issues. If the matter is not resolved, the EEOC or state agency will give you a "right to sue" letter. The issuance of the right to sue letter starts a new 90-day statute of limitations to file suit in court.

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 defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

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:

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