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Court Can Use its Equity Powers To Enforce USERRA

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Q: I am a Lieutenant (O-3) in the Coast Guard Reserve and a member of the Reserve Organization of America (ROA).³ I have read with great interest many of your “Law Review”

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1900 “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 1700 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.

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

articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I am a county police officer in Virginia.

I was hired by the county, as a rookie police officer, in April 2000. In April of next year, I will have 20 years with the police department and will be eligible to retire, and I plan to retire as soon as I am eligible.

Recently, I was on active duty and away from my police officer job for three years, from 10/1/2015 until 9/30/2018. I have read and reread your Law Review 15116 (December 2015), and I am certain that I met USERRA's five conditions for reemployment. In 2015, I left my job to go on active duty, and I gave the employer prior oral and written notice. I served honorably, and I did not receive a disqualifying bad discharge from the Coast Guard. Indeed, I was not discharged at all, just released from active duty. I did not exceed USERRA's five-year cumulative limit on the duration of my periods of uniformed service, relating to my employer relationship with the county. The three-year active duty period from 2015 to 2018 counts toward the five-year limit, but all my earlier duty periods since 2000 (when I started my job with the county police) have been exempt from the limit under section 4312(c) of USERRA, 38 U.S.C. 4312(c). I have read and reread your Law Review 16043 (May 2016) to ensure that I did not inadvertently exceed the five-year limit. When I was released from active duty on 9/30/2018, just over a year ago, I applied for reemployment almost immediately, well within the 90-day period authorized by section 4312(e)(1)(D) of USERRA, 38 U.S.C. 4312(e)(1)(D).

In 2010, after I was on the police force for ten years, I was promoted to the grade and role of detective, and I served as a detective from 10/1/2010 (when I was promoted) until 9/30/2015, when I left my job to go on active duty for three years. I was reemployed by the police department in October 2018, but not as a detective. I reverted to the status of patrol officer, a status from which I was promoted almost a decade before. When I returned to work in October 2018, was I entitled to reinstatement as a detective?

A: Yes. Because you met the five USERRA conditions in October 2018, you were entitled to be reemployed "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, *status*, and pay, the duties of which the person is

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.

qualified to perform.”⁴ The status of patrol officer is not the same as the status of detective, even if the pay is the same.

The word “status” is not defined in the text of USERRA, but it is defined in the law’s legislative history, as follows:

Although not the subject of frequent court decisions, courts [applying the 1940 reemployment statute that was replaced by USERRA in 1994] have construed status to include “opportunities for advancement, general working conditions, job location, shift assignment, and rank and responsibility.” *Monday v. Adams Packing Association, Inc.*, 85 LRRM 2341, 2343 (M.D. Fla. 1973). See *Hackett v. State of Minnesota*, 120 Labor Cases (CCH) 811,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of like status (See *Armstrong v. Cleaner Services, Inc.*, 79 LRRM 2921, 2923 (M.D. Tenn. 1972), *as would be reinstatement in a position which does not allow for the use of specialized skills in a unique situation.*⁵

If you had not left your job to respond to the call to the colors in the fall of 2015, you would still have been a detective in the fall of 2018 and today. Reemploying you in a position of lesser status was an egregious violation of USERRA.

Q: The police chief said that our department only has authorization and funding for ten detective positions, and the position I held in 2015, before I left the job for military service, was filled by a newly promoted detective who is doing a fine job. The police chief said that he would not reinstate me as a detective because doing so would require the demotion of another detective. What do you say about that?

A: Because you meet the five USERRA conditions, you are entitled to prompt reemployment in the position you would have attained if you had been continuously employed, or another position (for which you are qualified) that is of like seniority, status, and pay, even if that means that another employee must be displaced. 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 your right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit⁶ has held:

⁴ 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

⁵ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual*, by Katherine Piscitelli and Edward Still. The quoted paragraph can be found on pages 718-19 of the 2018 edition of the *Manual*. (Emphasis supplied.)

⁶ 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.

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.”⁷

The United States Court of Appeals for the Federal Circuit⁸ 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.⁹

Q: It is very important to me to be reinstated to my position as a detective for the last few months before I retire from the police department in April 2020. I contacted the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR). An ESGR volunteer explained to the police chief that I was entitled to reinstatement as a detective even if that meant that another detective would be downgraded to patrol officer, but the police chief refused to meet with the ESGR or to consider reinstating me as a detective.

Then, I made a formal written USERRA complaint against the police department with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency promptly investigated my claim and found it to have merit. The DOL-VETS investigator reported to me that he had found that I was entitled to reinstatement as a detective and had told the police chief that he was violating USERRA, but the police chief adamantly refused to come into compliance. The investigator explained that I could request referral of my case file to the United States Department of Justice (DOJ), and I promptly made that request. DOL-VETS promptly referred my case file to DOJ, but DOJ has taken a long time to decide whether to represent me in a lawsuit against the police department. DOJ is

⁷ *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013).

⁸ 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.

⁹ *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); *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).

supposed to decide within 60 days as to whether to represent me, after receiving the referral from DOL-VETS.¹⁰ DOJ has asked me for three extensions of that deadline. I still don't know if DOJ will represent me or whether I will need to find a private attorney to take the case.

If DOJ files suit on my behalf and prevails, what kind of relief is available to me?

A: USERRA provides:

(d) Remedies.

(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)

(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.¹¹

Q: If DOJ files suit on my behalf but the litigation extends beyond April 2020, when I retire from the police department, can the court order the police department to pay me money damages for my loss of status—for the fact that I was forced to serve as a patrol officer rather than a detective during my last 18 months of police department employment?

¹⁰ 38 U.S.C. 4323(a)(2).

¹¹ 38 U.S.C. 4323(d).

A: Probably not. The money damages that can be awarded under section 4323(d)(1)(B) appear to be limited to *pecuniary* damages—actual loss of salary or wages.

Q: Does that mean that the police department and the police chief can make a mockery of USERRA by the simple expedient of stringing this case out until April 2020, when I will retire from the department?

A: Fortunately, no. USERRA contains a provision designed for exactly this sort of situation: “The court shall use, in any case in which it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.”¹²

As I explained 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 write:

USERRA has two provisions authorizing courts to grant equitable relief when suit is brought against a private, state, or local government employer. Section 4323(d)(1)(A) authorizes a court to require the employer to comply with the Act. Section 4323(e) sweepingly empowers a court to use its “full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter [USERRA].

An amendment to section 4323(e) in 2008 strengthened the provision by encouraging courts to exercise their equity powers to accomplish full vindication of a plaintiff’s rights or benefits under the Act. As amended in 2008, section 4323(e) provides that the courts “shall” invoke their equity powers for such purpose “in any case in which the courts determine it is appropriate.”¹³

Q: What needs to happen now?

A: First, DOJ needs to file the suit *now*.

After filing the suit, DOJ needs to make a motion under section 4323(e), asking the judge to use his or her equity powers to order the police chief and the police department to reinstate you to your rightful position as a detective. The conditions for a temporary injunction have been met. There is a strong likelihood that you will succeed on the merits, and you will suffer irreparable injury if you are denied interim injunctive relief.

¹² 38 U.S.C. 4323(e).

¹³ *The USERRA Manual*, section 8:8. The quoted paragraphs can be found on page 417 of the 2018 edition of the *Manual*.

Please join or support ROA

This article is one of 1900-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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