

LAW REVIEW¹ 19096

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I Have Been Denied the Right To Telework because of my USAR Service

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[About Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.3.2.10—Furlough or leave of absence clause

1.8—Relationship between USERRA and other laws/policies

Q: I am a Captain in the Navy Reserve Judge Advocate General's Corps and a member of the Reserve Organization of America (ROA).³ For years, I have read with great interest your "Law

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.

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

Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On the civilian side, I am an Administrative Law Judge (ALJ) for a federal agency. I hear and decide cases brought under several statutes. Four days per month, on days when no hearings are scheduled, I am permitted to telework from home. This is a big deal, especially during bad winter weather days, because I live 80 miles from my office.

Recently, the ALJ who has administrative authority over all the ALJs in this region informed me that I will not be permitted to telework during 2020, because I fell short of my "quota" for cases decided during Fiscal Year 2019. I was away from my civilian job for four months of military duty during Fiscal Year 2019. Although I missed one-third of the workdays, I made 80% of the quota. The administrator said that does not matter—that the agency is only required to permit me to be absent from work for military service. He said that the agency is not required to adjust the work quota for the time that I was away from work for service.

What do you think?

A: I think that your USERRA rights have been violated. USERRA provides that you are "deemed to be on furlough or leave of absence" while performing uniformed service.⁴ It is unrealistic and unfair, and illegal, for the employer to expect you to produce just as much during 2/3 of the year as other similarly situated employees are expected to produce during the whole year.

Let us change the facts a little. Joe Smith, another ALJ, was away from work from August 2018 until November 2019—all Fiscal Year 2019 plus the end of Fiscal Year 2018 and the start of Fiscal Year 2020. If Smith meets the five USERRA conditions⁵ he is entitled to be reemployed in the position that he would have attained if he had been continuously employed or another position (for which he is qualified) that is of like seniority, status, and pay.⁶ Certainly Congress

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.

⁴ 38 U.S.C. 4316(b)(1)(A).

⁵ He must have left his job to perform uniformed service. He must have given the employer prior oral or written notice. He must not have exceeded the five-year cumulative limit on his period or periods of uniformed service, except as permitted by section 4312(c), which exempts nine kinds of service from the five-year limit. He must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from the period of service, he must have made a timely application for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of USERRA's eligibility criteria.

⁶ 38 U.S.C. 4313(a)(2)(A).

could not have intended that a person who was away from his or her civilian job for the entire fiscal year would have greater rights than the person who only missed part of the fiscal year.

USERRA makes it unlawful for an employer to impose “additional prerequisites” upon the exercise of USERRA rights.⁷ Your employer seeks to impose one hugely unrealistic additional prerequisite—that while you were away from your civilian job for military service you accomplished just as much work for the civilian employer as other employees who were present for work every workday.

Section 4311(a) of USERRA⁸ provides: “A person who performs ... service in a uniformed service shall not be denied ... any benefit of employment.” The term “benefit of employment” is broadly defined and includes “the opportunity to select work hours or *location* of employment.”⁹ Depriving you of the opportunity to work from home four days per month violates section 4311(a).

USERRA’s final section provides:

Training for Federal executive agency human resources personnel on employment and reemployment rights and limitations

(a) Training required. The head of each Federal executive agency shall provide training for the human resources personnel of such agency on the following:

(1) The rights, benefits, and obligations of members of the uniformed services under this chapter.

(2) The application and administration of the requirements of this chapter by such agency with respect to such members.

(b) Consultation. The training provided under subsection (a) shall be developed and provided in consultation with the Director of the Office of Personnel Management.

(c) Frequency. The training under subsection (a) shall be provided with such frequency as the Director of the Office of Personnel Management shall specify in order to ensure that the human resources personnel of Federal executive agencies are kept fully and currently informed of the matters covered by the training.

(d) Human resources personnel defined. In this section, the term “human resources personnel”, in the case of a Federal executive agency, means any personnel of the agency

⁷ 38 U.S.C. 4302(b).

⁸ 38 U.S.C. 4311(a).

⁹ 38 U.S.C. 4303(2).

who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter with respect to employees of the agency.¹⁰

I suggest that you ask your supervisor: When did you last take this required training? And were you paying attention?

Congress added this final section of USERRA in 2008¹¹ because it was exceedingly annoyed with federal supervisors who flout USERRA and claim to be unaware of it.

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.

¹⁰ 38 U.S.C. 4335 (bold title in original).

¹¹ Public Law 110-389, Title III, section 313(a); October 10, 2008, 122 Stat. 4166.

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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