

LAW REVIEW¹ 19101

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DOJ Sues Walmart for Violating USERRA

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[About Sam Wright](#)

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

In May 2016, Navy Reserve Third Class Petty Officer (E-4) Lindsey Hunger applied for a job at a Walmart store near her home and was told that she would be hired. During an initial interview with a Walmart supervisor, she mentioned that she was a member of the Navy Reserve and that she was required to attend a two-week annual training session that summer. The supervisor told her that Walmart would not permit her to be away from work for two weeks and that the job offer was rescinded.

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.

Hunger was unemployed because Walmart rescinded the job offer, and she was receiving unemployment compensation from her state. As a condition of receiving unemployment compensation, she was required to keep the state employment commission informed of her efforts to find a job. She informed the commission about what had happened at Walmart, and a commission employee contacted the company to confirm what she had said. A Walmart supervisor confirmed that Hunger had been denied initial hiring because of her Navy Reserve training obligations. Please see the linked ABC News report.

Hunger filed a formal written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), asserting that Walmart's decision not to hire her violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). The pertinent USERRA section is as follows:

- (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 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.³

Under section 4311(c)(1), above, Hunger is not required to prove that the employer's decision not to hire her was motivated *solely* by her Navy Reserve affiliation and her obligation to perform two weeks of annual training that summer (2016). She is only required to prove that her military obligations were *a motivating factor* in the employer's decision, but this time it seems clear that her military obligations were the sole reason for rescinding the job offer. Walmart found her well q

Q: If DOJ prevails in the lawsuit against Walmart, what remedies are available to Hunger?

A: The pertinent subsection of USERRA provides as follows:

(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.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.⁴

³ 38 U.S.C. 4311 (emphasis supplied).

⁴ 38 U.S.C. 4323(d) (emphasis supplied).

If Hunger still wants to work for Walmart, the court will order the company to hire her and to treat her as if she had been continuously employed since 2016. The court will also order the company to compensate her for the wages and benefits that she lost because the company violated the law in 2016 and thereafter.

In USERRA cases and employment discrimination cases generally, the plaintiff has a *duty to mitigate damages*. If Hunger had contacted me in 2016, I would have advised her to document carefully all her efforts to find suitable employment. She probably has such records.

Hunger apparently found another job late in 2016. Thus, she is entitled to back pay for her period of unemployment between May 2016 (when Walmart unlawfully rescinded the job offer) until late 2016 (when she started her new job). If the pay in the new job is less than the pay that she would have received from Walmart, but for the USERRA violation, she is entitled to additional back pay for the difference between what she would have earned at Walmart and the amount she earned in the other job.⁵ If the court finds that Walmart violated USERRA willfully, it will order the company to pay Hunger liquidated damages, in addition to the actual damages, and in the amount of the actual damages, thus doubling the award.⁶

Q: Volunteers for the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR) ask large and small employers to sign a “statement of support” pledging to support employees and job applicants who serve our country in the National Guard and Reserve, and Walmart has apparently signed such a statement. Is that meaningful?

A: Walmart is a huge company, with 4769 stores in the United States.⁷ The company has 1.5 million employees in the United States alone.⁸ At the corporate headquarters level, Walmart supports National Guard and Reserve members, but that corporate support is not always evident at the store manager level.

Please see the ABC News report on MSN.com:

<https://www.msn.com/en-us/news/us/doj-sues-walmart-for-allegedly-discriminating-against-a-navy-reserve-officer/ar-AAJF7tg?ocid=ientp>

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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.

⁵ Please see Law Review 206 (December 2005) for a detailed discussion of the computation of back pay in a USERRA case.

⁶ 38 U.S.C. 4323(d)(1)(C).

⁷ <https://www.statista.com/statistics/269425/total-number-of-walmart-stores-in-the-united-states-by-type/>.

⁸ <https://corporate.walmart.com/newsroom/company-facts>.

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.

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