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Recent Favorable Appellate Court Decision on USERRA

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About Sam Wright

1.1.1.2—USERRA applies to small employers
1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employment
1.1.3.1—USERRA applies to voluntary service
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***Mace v. Willis,* 897 F.3d 926 (8th Cir. 2018).[3]**

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[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] This is a recent decision of the United States Court of Appeals for the 8th Circuit, the federal appellate court that sits in St. Louis and hears appeals from district courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. The citation means that you can find this decision in Volume 897 of *Federal Reporter Third Series,* starting on page 926. As with all federal appellate court decisions, the case was decided by three appellate judges. In this case, the panel consisted of Judge Jane Louise Kelly, Senior Judge Robert Leland Wolman,

Kieshia Mace is an enlisted member of the South Dakota Army National Guard. She was away from her civilian job at Kickbox Dakota for three weeks of mandatory military training.[4] She met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[5] Because she met the five conditions, she was entitled to prompt reinstatement in her civilian job, but the employer (Kickbox Dakota) instead replaced her.

Mace sued Kickbox Dakota and Willis (the owner-operator) in the United States District Court for the District of South Dakota. She prevailed and was awarded $979.20 in lost wages. The District Judge (hearing the case without a jury) found that the defendants violated USERRA willfully and thereby doubled the damage award. The defendants appealed.

Kickbox Dakota is a struggling small business with a handful of part-time employees, but that fact does not mean that USERRA does not apply or that USERRA violations are excused or mitigated. Other federal employment laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, only apply to employers with 15 or more employees. USERRA and its predecessor (the VRRA) have never had such a threshold for applicability. USERRA's legislative history provides: "This chapter [USERRA] would apply, as does current law [the VRRA], to all employers, regardless of the size of the employer or the number of employees. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992)."[6]

Employment at Kickbox Dakota (a gym) was an informal affair. Mace and the other employees used a cell telephone application (provided by Kickbox) to make themselves available for shifts

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and Senior Judge Morris Sheppard Arnold. Judge Kelly wrote the decision and the other two judges joined in a unanimous panel decision.

[4] The result would have been the same if her service had been voluntary instead of mandatory. Please see Law Review 15010 (August 2015) and Law Review 101 (December 2003).

[5] She left her civilian job to perform uniformed service as defined by USERRA. She gave the employer prior oral or written notice. She did not exceed the cumulative five-year limit on the duration of the periods of service that she has performed, relating to the employer relationship for which she seeks reemployment. She served honorably and did not receive a disqualifying bad discharge from the military. After she completed her three-week military period, she reported back to the civilian employer immediately. Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

[6] Report of the Committee on Veterans' Affairs, United States House of Representatives, House Committee Report, April 28, 1993, H.R. Rep. No. 103-65, Part 1, reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The two quoted sentences can be found on page 763 of the 2019 edition of the *Manual. Cole v. Swint* is a 1992 decision of the United States Court of Appeals for the 5th Circuit, the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. Dr. Swint owned a ranch and had one employee, ranch-hand Cole. Cole joined the National Guard and left his civilian job for several months of initial military training. When he returned and applied for reemployment, Dr. Swint refused because he had filled the position with a new ranch-hand with whom he was pleased. The District Court and the Court of Appeals held that neither the small size of the employer (only one employee) nor the fact reinstating Cole would require the displacement of the other employee excused Dr. Swint's violation of the reemployment statute.

and the owner of the establishment or the manager scheduled employees to work as needed for coverage. During the weeks prior to her military-related absence from work, Mace worked an average of only 13.6 hours per week, and that included several occasions when she was called in at the last minute to replace another employee who failed to show up for a scheduled shift.

The fact that Mace's job was part-time in no way diminishes her USERRA rights. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows: "USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal position."[7]

In her scholarly opinion, Judge Kelly wrote:

> Mace, a member of the South Dakota National Guard, was working at Kickbox Dakota when she left for three weeks of mandatory military training. In the months leading up to her departure, Mace was averaging 13.6 hours per week at Kickbox Dakota. Mace, like the other fitness trainers, was not guaranteed shifts at the gym. Instead, Kickbox Dakota's owner, Willis, or his general manager would schedule trainers like Mace for shifts using a mobile app, and would sometimes call Mace in to cover shifts for absent coworkers. There is no dispute that Mace timely notified Willis that she was a member of the National Guard, and that her departure was for mandatory military training.
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> While Mace was away at training, Willis deleted her from the scheduling app and hired a new employee to take shifts at the gym. When Mace returned, she asked why she could not access the app. Two days after Mace returned, Willis hired another new employee. Meanwhile, Willis's general manager told Mace she had been replaced. Although Willis later offered to put Mace back on the schedule, she decided to find other work instead. She filed this lawsuit. After a bench trial, the district court found that Willis had violated USERRA by failing to promptly reemploy Mace, and that the violation was willful. On appeal, we review the district court's fact-finding for clear error and its legal conclusions de novo. *Lisdahl v. Mayo Foundation,* 633 F.3d 712, 717 (8th Cir. 2011).
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> USERRA protects "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services . . . ." 38 U.S.C. 4312(a). The Act generally "entitle[s]" these service members, with some limitations not relevant here, to reemployment "in the position of employment in which [they] would have been employed if [their] continuous employment . . . had not been interrupted" by military service. Id. Section 4313(a)(1), 4313(a)(2). And although "USERRA cannot put the employee in a *better* position than if he or she had remained in the civilian employment position," 20 C.F.R. 1002.42 (emphasis added), the Act "must be broadly construed in favor of its military beneficiaries." *Maxfield v. Cintas Corp. No. 2,* 427 F.3d 544, 551 (8th

[7] 20 C.F.R. 1002.41.

Cir. 2005) (quoting *Hill v. Michelin North America, Inc.,* 252 F.3d 307, 312-13 (4th Cir. 2001)
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Willis argues that he is not liable under USERRA because he *did* put Mace back in the same position she left when she departed for training: an employee whom he had complete discretion to assign no shifts at all. We disagree. The facts clearly indicate that Willis replaced Mace and did not later reemploy her. Willis and his general manager used the app to schedule employees' shifts, so the effect of removing Mace from the app was to remove her from the pool of eligible workers. Willis also hired two additional staff members—one while Mace was gone, and one shortly after she returned—and told Mace (through his manager) that she had been replaced.

Because Willis did not promptly reemploy Mace following her military service, he and Kickbox Dakota can only avoid USERRA liability if the Act does not apply to employees who lack guaranteed shifts. But it does. The Act's implementing regulations make clear that even temporary, probationary, and seasonal employees enjoy USERRA protections. 20 C.F.R. § 1002.41 ("USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position."); see also 38 U.S.C. § 4316(c)(2). And although employers have an affirmative defense when the job in question "was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period," 20 C.F.R. § 1002.41, Willis did not raise it in the district court or on appeal. Nor does Willis invoke any of USERRA's other exceptions. *See, e.g.,* 38 U.S.C. 4312(d). Accordingly, Willis and Kickbox Dakota were obligated to promptly reemploy Mace upon her return from mandatory military training. Though this requirement may burden employers like Kickbox Dakota, the Act reflects Congress's determination that, in the main, this burden is justified to ensure that members of the armed forces do not lose their livelihoods because of their service to the nation. *See* 38 U.S.C. 4312(d) (providing employers with only limited statutory exemptions); *Maxfield,* 427 F.3d at 551.[8]

USERRA provides that, in a USERRA case against a private employer or a state or local government, the District Court can order the employer to pay double damages if the court finds that the employer violated USERRA willfully (knew about the law and violated it anyway).[9] The District Court (in a bench trial—no jury) found that Willis and Kickbox Dakota violated the law willfully and ordered double damages. The defendants appealed. The 8th Circuit held that the question of willfulness was a question of fact for the jury, or for the judge in a bench trial, and that the finding of fact on willfulness should be overturned on appeal only if it had been clearly erroneous.

[8] *Mace,* 897 F.3d at 927-28.
[9] 38 U.S.C. 4323(d)(1)(C).

The 8th Circuit panel affirmed the District Court's judgment for the plaintiff and remanded the case to the District Court to resolve the question of attorney fees for Mace's counsel.[10] On remand, Magistrate Judge Veronica L. Duffy awarded Mace $32,775.13 in attorney fees.[11] The defendants strenuously objected to the award of attorney fees far in excess of the amount awarded to the plaintiff for lost wages and liquidated damages. In her scholarly opinion, Judge Duffy wrote:

> Kickbox also argues the small damages recovery by Ms. Mace (approximately $1,900 in damages and liquidated damages) shows she did not prevail to a great degree and her attorney's fee request should accordingly be reduced. But as indicated above, the money damages obtained is only a small slice of the picture of what Congress intended to vindicate when it enacted USERRA.
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> USERRA, like other employment-related civil rights litigation, will frequently feature plaintiffs like Ms. Mace whose wages are not high, who dutifully and quickly obtain replacement jobs, and whose damages, therefore, would not be sufficient to entice a lawyer to take the litigation if the lawyer were limited solely to a contingent fee arrangement for payment. Furthermore, such plaintiffs are extremely unlikely to have the resources to pay a lawyer on an hourly basis for work on their case. Hence, Congress provided a fee-shifting provision as an enticement for lawyers to take cases, acting as private attorneys general, vindicating important public policies that might otherwise be trampled. Were it not for the attorney's fee statute in the USERRA scheme, the court feels certain Ms. Mace's claim would not have been brought by any lawyer. Lawyers have to support themselves and their families. They cannot do that by earning fees of $300 on 120 hours of work, an hourly rate of $2.50 per hour.[12]

This case is now over. I congratulate attorney Alex M. Hagen of Sioux Falls, South Dakota for his imaginative, diligent, and successful representation of this National Guard service member (Mace) and for creating a favorable precedent that will be most useful to National Guard and Reserve members in South Dakota and all over the country.

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[10] USERRA provides that if a person retains private counsel as a USERRA plaintiff and prevails, the court may order the defendant to pay the plaintiff's attorney fees. 38 U.S.C. 4323(h)(2).

[11] This figure is based on an hourly rate of $250 multiplied by the number of hours that the attorney reasonably spent on the case, as determined by Judge Duffy.

[12] *Mace v. Willis,* 2018 U.S. Dist. LEXIS 168471 (D.S.D. Sept. 28, 2018).

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.

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