

## LAW REVIEW<sup>1</sup> 19107

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### Seventh Circuit Reverses the Northern District of Illinois in a USERRA Case

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1.1.1.7—USERRA applies to state and local governments

1.1.3.3—USERRA applies to National Guard service

1.2—USERRA forbids discrimination

1.3.1.2—Character and duration of service

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***Mueller v. City of Joliet, 2019 WL 6522618, 2019 U.S. App. LEXIS 35976 (7<sup>th</sup> Cir. Dec. 4, 2019).***<sup>3</sup>

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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](mailto:SWright@roa.org).

<sup>3</sup> This is a very recent decision of the United States Court of Appeals for the 7<sup>th</sup> Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. As with all federal appellate court cases, the case was decided by a panel of three federal appellate judges. In this case, the three judges were Judge Diane Pamela Wood (current Chief Judge of the 7<sup>th</sup> Circuit), Judge William J. Bauer (Senior Judge of the 7<sup>th</sup> Circuit), and Judge Michael B. Brennan (currently serving and recently appointed 7<sup>th</sup> Circuit Judge). Judge Brennan wrote the decision and was joined by the other two judges in a unanimous panel decision.

David Mueller is a Sergeant in the Police Department of Joliet, Illinois and an enlisted member of the Illinois Army National Guard. In 2016, he volunteered for and was called to 144 days (5/9/2016 to 9/30/2016) of full-time duty under section 502(f) of title 32 of the United States Code. For reasons that are not made clear in the opinion, Mueller's full-time military service was in fact cut off after just 83 days, on 8/1/2016. When Mueller learned that he would be on full-time military duty starting on 5/9/2016, he gave proper notice to his police department supervisor and to the police department's personnel department.

Mueller apparently returned to work for the police department after his 83-day active duty period, but we do not know how long the department made him wait, and we do not know if he was properly reinstated in the position that he *would have attained if he had been continuously employed (possibly a better position than the one he left)*. We do not know if his health insurance coverage, through his civilian job, was promptly and properly reinstated upon his return to work. We do not know if his rate of pay upon reemployment was correct. We do not know if Mueller has been properly credited with the seniority and pension credit that he would have earned if he had been continuously employed. We do not know whether Mueller has been discriminated against with respect to promotions or benefits of employment, because the city is annoyed with him about the 2016 absence from work for military service, as well as earlier and later absences.

Mueller's claim was dismissed on a motion to dismiss, at the very outset of the litigation, so there has been no discovery. Mueller and his attorney have had no opportunity to obtain evidence from the city to prove USERRA violations.

Mueller sued the City of Joliet<sup>4</sup> in the United States District Court for the Northern District of Illinois. The case was assigned to Judge Harry D. Leinenweber<sup>5</sup> of that court.

In the lawsuit, Mueller claimed that the City of Joliet violated his USERRA rights. Mueller also claimed that his rights under the Illinois Military Leave of Absence Act (IMLAA)<sup>6</sup> were violated

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<sup>4</sup> The City of Joliet is a political subdivision of the State of Illinois. Unlike arms of the states, political subdivisions of states do not have immunity from suit in federal court under the 11<sup>th</sup> Amendment to the United States Constitution. Accordingly, it is possible to sue a political subdivision, like the City of Joliet, in federal court, in one's own name and with one's own lawyer. *See Weaver v. Madison City Board of Education*, 771 F.3d 748 (11<sup>th</sup> Cir. 2014); *Sandoval v. City of Chicago*, 560 F.3d 703 (7<sup>th</sup> Cir.), *cert. denied*, 558 U.S. 874 (2009).

<sup>5</sup> Judge Leinenweber joined the court in 1985, after he was nominated by President Ronald Reagan and confirmed by the Senate. Some years ago, he took senior status so that another judge could be appointed, but he continues to hear an active docket of cases.

<sup>6</sup> 5 ILCS 325/1.

by the City of Joliet, and he claimed that the federal court had jurisdiction of that claim under its supplemental jurisdiction.<sup>7</sup>

The City of Joliet filed a *motion to dismiss* Mueller's USERRA claim, under Rule 12(b)(6) of the Federal Rules of Civil Procedure,<sup>8</sup> contending that Mueller's 83-day military period in 2016 constituted *state active duty* not protected by the federal law (USERRA). Judge Leinenweber granted the city's motion to dismiss, holding: "Because Plaintiff's tour of duty was clearly under the authority of the State of Illinois, USERRA has no applicability to this case."<sup>9</sup> Having dismissed Mueller's federal (USERRA) claim, Judge Leinenweber declined to exercise supplemental jurisdiction over his state law claim, under section 1367(c)(3).<sup>10</sup>

**Judge Leinenweber erred when he held that Mueller's 2016 duty was not protected by USERRA.**

Judge Leinenweber apparently believes that there are two kinds of military duty performed by National Guard members and that only one of them is protected by USERRA. He apparently puts National Guard duty into two boxes:

- a. Federal active duty under title 10 of the United States Code—protected by USERRA.
- b. State active duty under title 32 of the United States Code—not protected by USERRA.

In fact, National Guard duty needs to be considered in three boxes:

- a. Federal active duty under title 10—protected by USERRA.
- b. State active duty under title 32—protected by USERRA. Although this form of duty is considered state duty, it is authorized by federal law—title 32 of the United States Code—and the Federal Government (not the state) pays the salary and benefits of National Guard members on title 32 duty. The purpose of title 32 duty is to ensure the readiness of National Guard personnel for the federal mission—defending our country.
- c. State active duty—called by the Governor, under state authority, paid with state funds, for state emergencies like floods, tornadoes, and riots, etc. State active duty is not

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<sup>7</sup> 28 U.S.C. 1367(a). When a federal court hears a federal law claim, it can also hear, under supplemental jurisdiction, a closely related state law claim that is part of the same case or controversy.

<sup>8</sup> Under Rule 12(b)(6), a federal judge should dismiss a claim at the outset of the litigation if the judge can say that the plaintiff has failed to state a cause of action for which the court can award relief, *even assuming that all of the plaintiff's factual assertions are true*.

<sup>9</sup> See *Mueller v. City of Joliet*, 2018 WL 2045451, 2018 U.S. Dist. LEXIS 74145 (N.D. Ill. May 2, 2018). I discuss and criticize Judge Mueller's decision in detail in Law Review 19056 (June 2019).

<sup>10</sup> 28 U.S.C. 1367(c)(3).

protected by USERRA, but every state has a law protecting the civilian jobs of National Guard members performing state active duty.<sup>11</sup>

When a federal statute defines terms, the statutory definitions control for purposes of that statute. Section 4303 of USERRA<sup>12</sup> defines 16 terms, including “uniformed services” and “service in the uniformed services.” USERRA defines the term “uniformed services” as follows:

The term "uniformed services" means the Armed Forces, *the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty*, the commissioned corps of the Public Health Service, System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and any other category of persons designated by the President in time of war or national emergency.<sup>13</sup>

USERRA defines the term “service in the uniformed services” as follows:

The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, *full-time National Guard duty*, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.<sup>14</sup>

Both section 4303(13) and section 4303(16) include the term “full-time National Guard duty” in the definition of “service in the uniformed services” and “uniformed services.” The term “full-time National Guard duty” is not defined in USERRA, but it is defined in the definitions section of title 10 of the United States Code, as follows:

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<sup>11</sup> Some of those laws are better than others. Please see the “state leave laws” section at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find 54 articles, one for each state plus the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. These articles cover the state laws that protect the civilian jobs of National Guard members when they are on state active duty.

<sup>12</sup> 38 U.S.C. 4303.

<sup>13</sup> 38 U.S.C. 4303(16) (emphasis supplied).

<sup>14</sup> 38 U.S.C. 4303(13) (emphasis supplied).

The term “full-time National Guard duty” means training *or other duty*, other than inactive duty, *performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory* under section 316, 502, 503, 504, or 505 of title 32 *for which the member is entitled to pay from the United States* or for which the member has waived pay from the United States.<sup>15</sup>

When Mueller enlisted in the Army National Guard, he took two enlistment oaths and joined two overlapping but legally distinct organizations. He joined the *Illinois* Army National Guard, which is the present-day successor of the Illinois state militia.<sup>16</sup> Mueller is a member of this *state entity* all the time, except when he volunteers for or is called to federal active duty under title 10 of the United States Code. On most days when Mueller is in state status, he performs no military duty—on those days he is performing his civilian job as a Joliet police officer. On some days, while in state status, Mueller performs *state active duty*, and he is not protected by USERRA for his duty on those days.

On other days, while in state status, Mueller performs inactive duty training (drills—usually but not always on weekends), active duty for training (annual training—traditionally for two weeks at a time but now often for substantially longer periods), and *full-time National Guard duty*. *Mueller is in state status on these days, but his duty is protected by USERRA because USERRA expressly so provides.*

Mueller’s orders for his 83-day period of full-time National Guard duty in 2016 cite 32 U.S.C. 502(f). Section 502 is one of the title 32 sections that is mentioned in the definition of “full-time National Guard duty.” *Mueller performed 83 days of full-time National Guard duty in 2016, and his civilian job was protected by USERRA for that period.*

### **Effect of the Posse Comitatus Act**

In his opinion, Judge Leinenweber wrote:

An important limitation on the federal use of the National Guard is the Posse Comitatus Act, 18 U.S.C. 1385 (PCA).<sup>17</sup> This Act prohibits the use of the Army or Air Force in the

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<sup>15</sup> 10 U.S.C. 101(a)(5) (emphasis supplied). The identical definition appears in the definitions section of title 32, 32 U.S.C. 101(19).

<sup>16</sup> The National Guard traces its origin to 1636, when the Massachusetts Bay Colony established its militia to protect the colonists from the Pequot Indians.

<sup>17</sup> The PCA was enacted in 1877 to fulfill the corrupt bargain the settled the disputed presidential election of 1876. The Southern Democrats agreed to let Rutherford B. Hayes, the Republican nominee, be inaugurated, in exchange for his agreement to withdraw federal troops from the former Confederate states and end the Reconstruction Era. Throughout the Administration of President Ulysses S. Grant (1869-1877), the Federal Government made valiant efforts to enforce the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments to the United States Constitution and the federal civil rights

execution of criminal laws of the United States. The PCA only applies to the National Guard when it is placed in federal service as part of the Army or Air Force and does not apply to the National Guard when it is in its militia status, i.e., under state control.

*Memorandum Opinion of Douglas W. Kmiec, Assistant Attorney General Office of Legal Counsel, April 4, 1989.*

Judge Leinenweber inferred that Mueller's 2016 active duty must be "state" service, and not protected by USERRA, because if his service had been federal his "counterdrug" activities would have violated the PCA. Judge Leinenweber fundamentally misunderstood the kind of "counterdrug" activities that National Guard members routinely undertake. Most of those efforts against drug abuse focus on the demand side, not the supply side, and education rather than law enforcement. Most of those National Guard efforts are through the Drug Abuse Resistance Education (DARE) program, and those efforts focus on "teaching student decision making for safe and healthy living."<sup>18</sup>

I concede that some of the National Guard counterdrug efforts are a little closer to law enforcement and may push the PCA envelope. For example, National Guard soldiers and airmen operate helicopters and fixed wing aircraft to surveille border areas and report to law enforcement on observed instances of smuggling or other illegal activities. These soldiers and airmen do not land the aircraft and attempt to arrest the smugglers. I hope that disputes about the outer limits of the PCA prohibition do not result in individual National Guard soldiers and airmen losing their civilian jobs.

### **Mueller's appeal to the 7<sup>th</sup> Circuit**

As I predicted in Law Review 19056 (June 2019), Mueller appealed to the 7<sup>th</sup> Circuit, and that appellate court reversed Judge Leinenweber's dismissal of Mueller's case. In his scholarly decision (joined by his two colleagues on the three-judge appellate panel), Judge Brennan wrote:

Mueller, supported by the United States and several State governments as amici, appeals the district court judgment and argues that the judge misinterpreted USERRA by excluding Mueller's service from protection. Specifically, he argues that USERRA's discrimination section protects "service in a uniformed service," which [38 U.S.C. § 4303\(13\)](#) defines as including "full-time National Guard duty." Mueller argues his service

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statutes that were enacted in the years following the end of the Civil War. After federal troops withdrew, all federal efforts to enforce the civil rights of the former slaves and their descendants ended, and the result was the lamentable "Jim Crow" era when the former slaves and their offspring were reduced to a status that was not much better than their former slave status. The PCA ensured that federal troops would not be reintroduced to the former Confederate states. Serious federal efforts to enforce civil rights did not resume until the 1960s, almost a century later.

<sup>18</sup> See <https://dare.org>.

is explicitly categorized as full-time National Guard duty and federally authorized by [32 U.S.C. §§ 112](#) and [502\(f\)](#).

We review *de novo* a district court's grant of a [Federal Rules of Civil Procedure 12\(b\)\(6\)](#) motion to dismiss. [Roberts v. City of Chicago](#), 817 F.3d 561, 564 (7th Cir. 2016). In doing so, we accept all well-pleaded facts in the complaint as true. *Id.* We note that here the issue concerns statutory interpretation and is thus a question of law. [Commodity Futures Trading Comm'n v. Worth Bullion Grp., Inc.](#), 717 F.3d 545, 549 (7th Cir. 2013). We start with "the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id. at 550* (quoting [Turley v. Gaetz](#), 625 F.3d 1005, 1008 (7th Cir. 2010) and [Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.](#), 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582 (1985)). The statutory scheme of USERRA and National Guard service make it clear that Mueller's "Full-Time National Guard Duty" is authorized by federal law and protected by USERRA.

The USERRA employment discrimination section states that those in "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." [38 U.S.C. § 4311\(a\)](#). The definitions section of USERRA defines "service in the uniformed services" as "the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes ... full-time National Guard duty." [38 U.S.C. § 4303\(13\)](#).

Instead of engaging in this statutory analysis, the district court looked to a Department of Labor regulation that said National Guard service under State law authority is not protected by USERRA. [20 C.F.R. § 1002.57\(b\)](#). Even if the regulation were necessary to interpret USERRA, the previous subsection states that "National Guard service under Federal authority is protected by USERRA," which "includes duty under Title 32 of the United States Code, such as ... full-time National Guard duty." [20 C.F.R. § 1002.57\(a\)](#). As pointed out by the amici, the regulation serves to clarify that USERRA does not protect National Guard service in "State Active Duty," which is under exclusive State authority. Both USERRA and the regulation state, in plain language, that Title 32 full-time National Guard duty is covered.

The district court also erred in its interpretation of [32 U.S.C. § 112](#) and the Posse Comitatus Act by conflating federal service and federal authority. [Section 112](#) of Title 32 covers counterdrug activities and specifically creates a mechanism whereby the federal government provides funds to a State who has its counterdrug plan approved by the Department of Defense. [32 U.S.C. § 112](#).

The district court erroneously concluded that since multiple provisions of [Section 112](#) barred personnel "in Federal service" from performing counterdrug activities, Mueller's service could not be under "Federal authority." First, equating federal service and federal authority creates unnecessary contradictions between [32 U.S.C. § 112](#) and the

Department of Labor regulation that considers Title 32 full-time National Guard duty as "under Federal authority."

Second, the language of USERRA does not limit protection to those in "Federal service" like the Army or Navy but to those in "service in a uniformed service," which explicitly includes Title 32 full-time National Guard duty. The Posse Comitatus Act likewise only bars the Army and Air Force from domestic law enforcement, but does not apply to Title 32 National Guard duty. [18 U.S.C. § 1385](#). Federal service for purposes of the Posse Comitatus Act refers to standing active duty forces organized under Title 10 of the U.S. Code. While the Army National Guard and the Air National Guard are reserve components of the Army and Air Force, respectively, the National Guards are covered by different statutes (*i.e.*, Title 32) than those that apply to the active duty forces (*i.e.*, Title 10). Because Title 32 full-time National Guard duty is considered State service that is distinct from the Army and Air Force, extending USERRA's protection to Mueller does not violate [32 U.S.C. § 112](#) or the Posse Comitatus Act.

In sum, the district court erroneously conflated federal authority and federal service and misinterpreted the Department of Labor regulation's binary between federal authority and state authority. USERRA's discrimination provision does not turn on such distinctions since, by constructing Title 32 activities under [Section 112](#) as "Full-Time National Guard Duty," Congress intended for Mueller's service to be covered by USERRA. We decline the invitation to carve out an exception for [Section 112](#) counterdrug activities when there is no textual or public policy rationale to do so.

We conclude that the district court judge erred in its interpretation of USERRA and Title 32 National Guard service under [Section 112](#). The plain language of Title 32 contemplates Mueller's service as "Full-Time National Guard Duty," which USERRA explicitly covers. The judgment of the district court is therefore REVERSED and we remand for further proceedings consistent with this opinion, including the reinstatement of Mueller's state law claim.

### **Congratulations and gratitude**

Congratulations to attorney John N. Maher of St. Charles, Illinois for his imaginative, diligent, and (so far) successful representation of National Guard member David Mueller in this important case. Thank you also to attorneys Thomas E. Chandler, Katherine E. Lamm, and Christine A. Monta (Appellate Section, Civil Rights Division, United States Department of Justice) for their *amicus curiae* (friend of the court) brief on behalf of the United States of America and to attorney Richard S. Huszagh (Civil Appeals Division, Office of the Illinois Attorney General) for his brief on behalf of the State of Illinois, supporting Mueller.

### **Is this case over?**

No, this case is a long way from over. The case was remanded to the United States District Court for the Northern District of Illinois. Because Judge Leinenweber dismissed the case at the motion to dismiss stage, there has been no discovery in this case. Judge Leinenweber (unless the case is reassigned to another judge) will need to preside over discovery, which may be lengthy and contentious. After discovery, there will likely be cross motions for summary judgment. If the judge denies the summary judgment motions, there will be a trial, perhaps before a jury.<sup>19</sup> We will keep the readers informed of developments in this interesting and important case.

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<sup>19</sup> It is also possible, indeed likely, that at some point the City of Joliet will come to its senses, make a reasonable settlement offer to Mueller, and start complying with USERRA.