LAW REVIEW[1] 20002
January 2020

Favorable USERRA Decision by the 8th Circuit—Part 1

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.3.3—USERRA applies to National Guard service
1.3.1.3—Timely application for reemployment
1.3.2.1—Prompt reinstatement after service
1.3.2.9—Accommodations for disabled veterans
1.4—USERRA enforcement

Scudder v. Dolgencorp, LLC, 900 F.3d 1000 (8th Cir. 2018).[3]

Facts

Samuel Scudder was a Sergeant in the Arkansas Army National Guard when he was hired by Dolgencorp, LLC[4] in June 2013. Sometime after he was hired, he was promoted to the store

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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. As is always the case in the federal appellate courts, the case was heard by a panel of three judges. In this case, the three judges were Steven M. Colloton, Bobby Shepherd, and David R. Stras. Judge Shepherd wrote the decision, and the other two judges joined in a unanimous panel decision.

[4] Dolgencorp operates "Dollar General" stores across our country.

manager position of the Dollar General Benton Parkway store in Benton, Arkansas. He was involuntarily called to active duty with his Army National Guard unit, and he deployed to Afghanistan in June 2014. He was wounded in action, and his active duty period was extended for medical treatment and processing of a military disability retirement.[5]

Dolgencorp contracted with a company called Matrix Absence Management (Matrix) to manage leaves of absence for Dolgencorp employees nationwide. On its website, Matrix describes itself as follows:

> We are a leading absence management provider currently managing over 450,000 claims for employers with as few as 500 employees and as many as 500,000. Matrix provides best in class, fully compliant administrative services for managing employee leaves of absence, disability benefits, worker's compensation benefits, and ADA [Americans with Disabilities Act] accommodations.[6]

It appears that, despite Matrix's claims to be "best in class" and "fully compliant" with relevant laws, the company's employees who dealt with Scudder were completely unfamiliar with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and with the scenario of an employee leaving a job when called to the nation's service and returning to the job after completing the service. Moreover, Matrix employees were rude to Scudder, did not return his calls, and misconstrued what he told them.

When Scudder was called to active duty in 2014, he requested military leave through Matrix, and leave was apparently granted for approximately one year. Other members of Scudder's National Guard unit returned to Arkansas and to their civilian jobs in 2015, but Scudder was retained on active duty by the Army, for medical treatment and for processing for a military disability retirement. Scudder was assigned to a "wounded warrior battalion" at Fort Leonard Wood in Missouri. He left active duty sometime in February 2016, according to the District Court decision.[7]

Matrix granted Scudder additional leave through April 1, 2016.[8] When that date approached, he tried to communicate with Matrix to report that he needed additional time to recover from his wounds. Judge Shepherd's scholarly opinion includes the following:

> When Scudder was deployed to Afghanistan in April 2014, he coordinated his military leave through Dollar General's third-party leave coordinator: Matrix Absence Management ("Matrix"). Scudder was wounded in action in Afghanistan and assigned to a unit at Fort

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[5] The facts in this article come directly from the court decision.

[6] https://www.matrixcos.com/

[7] *Scudder v. Dolgencorp, LLC,* 2017 U.S. Dist. LEXIS 132300 (E.D. Ark. Aug. 18, 2017).

[8] It is unclear how or why the April 1 date was chosen. Because Scudder was on active duty for more than 180 days, he had 90 days (starting on the date of release from duty) to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Even if Scudder was released from active duty on February 1, the 90-day deadline for him to *apply for reemployment* (not necessarily to return to work) would have been May 1, 2016.

> Leonard Wood, Missouri from December 2014 to February 2016 for medical transition out of the military. While there, Scudder provided notice to Matrix of his continuing military leave and was approved for leave through April 1, 2016.
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> On March 31, 2016, Scudder spoke with Matrix claims examiner Jessica Morentin. Scudder testified: "So I explained my deal to her again and said, in a sense, they won't return my calls for me to be able to find out if I need to return to work, to find out if I need to put in my two weeks because I can't return to work." Morentin understood Scudder to be resigning and emailed notice of his resignation to Dollar General on April 4, 2016. Dollar General requested confirmation, and Morentin confirmed Scudder "would not be going back to Dollar General." Concluding Scudder had resigned, Dollar General processed the separation of his employment, effective April 5, 2016, and sent him an exit survey. Scudder responded to that email, saying "I'm emailing you to see if maybe you car[e] [because] apparently the rest of the company does not. I'm a store manager for you in region 59[.] [W]ell I guess getting this[,] I use[d] to be." He went on to say that he was called to active duty in support of Operation Enduring Freedom in Afghanistan, was injured while overseas, and had been able to reach only one person at Dollar General while also trying to contact the human resources department and the current district manager. He concluded, "I really enjoyed working for [D]ollar [G]eneral and would've loved to continue to work for [D]ollar [G]eneral." Scudder received no response.
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> On April 24, 2016, Scudder applied online for a store manager position at a Dollar General store in Bryant, Arkansas ("Bryant store"). In his application, he indicated that he previously worked for Dollar General but was "let go . . . after returning from Afghanistan injured and no one from the corporation would ever contact [him] back." He stated he was formerly a store manager at Dollar General's Benton store and listed the National Guard as one of his previous employers. Dollar General did not hire Scudder for the position.[9]

Scudder apparently had been released from active duty but was still convalescing from the Afghanistan combat wound. Thus, the deadline for him to apply for reemployment would have been extended during his hospitalization or convalescence, and that period could have lasted up to two years.[10]

Section 4331 of USERRA[11] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The pertinent section of the DOL USERRA Regulation is as follows:

> **Is the time period for reporting back to an employer extended if the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?**
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> **Yes.** If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an

[9] *Scudder,* 900 F.3d at 1003.
[10] 38 U.S.C. 4312(e)(2)(A).
[11] 38 U.S.C. 4331.

> application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer and is not applicable following reemployment.[12]

It appears that Scudder was entitled to reemployment because he met the five conditions for reemployment under USERRA:

a. He left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.
b. He gave the employer prior oral or written notice that he was leaving the job to perform service.
c. His cumulative period or periods of uniformed service, relating to the employer relationship for which he sought reemployment, must not have exceeded five years.[13]
d. He must have been released from the period of service without having received a disqualifying bad discharge from the military.[14]
e. After release from the period of service, he made a timely application for reemployment.[15]

Scudder's lawsuit against Dolgencorp and the District Court decision

Scudder retained private counsel[16] and sued Dolgencorp in the United States District Court for the Eastern District of Arkansas. The case was assigned to Beth M. Deere, United States Magistrate Judge.[17]

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[12] 20 C.F.R. 1002.116 (bold question and bold Yes in original).

[13] Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions to the limit—that is, there are nine kinds of service that do not count toward exhausting your limit. Scudder's period of active duty that began in 2014 is exempt from the computation of the five-year limit because he was called to duty involuntarily. *See* 38 U.S.C. 4312(c)(4)(A).

[14] If you receive a punitive discharge by court martial or administrative discharge characterized as "other than honorable," you will not have the right to reemployment. *See* 38 U.S.C. 4304.

[15] Scudder's application for reemployment was timely, and the wording was at least arguably adequate. Please see Law Review 20003 (January 2020). The 8th Circuit panel *did not find that Scudder had made a proper application for reemployment.* Rather, the appellate panel only found that Scudder had done "just enough" to preclude granting summary judgment to the employer on the issue.

[16] There is no indication that Scudder requested the assistance of the Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR) or that he filed a written USERRA complaint against Dolgencorp with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). Scudder had the right to bypass DOL-VETS altogether and file suit in federal district court with his own lawyer and in his own name. *See* 38 U.S.C. 4323(a)(3)(A).

[17] Unlike a Federal District Judge, a Magistrate Judge is appointed by the judges, not by the President with Senate confirmation. A Magistrate Judge can make a ruling (as opposed to a recommendation) on a dispositive motion (like a motion for summary judgment) only if all parties have agreed to let the Magistrate Judge decide. Civil cases in federal court are frequently decided by Magistrate Judges, because otherwise there may be a long wait for a duty appointed District Judge.

After the discovery process was completed, Dolgencorp filed a motion for summary judgment (MSJ), which Magistrate Judge Deere erroneously granted. Under Rule 56 of the Federal Rules of Civil Procedure (FRCP), the trial judge should grant a summary judgment motion only if he or she can say, after a careful review of the evidence, that there is *no evidence* to support the non-moving party's claim or defense and that *no reasonable jury could find for the non-moving party.*

In her decision, Magistrate Judge Deere wrote:

> Mr. Scudder never demanded reemployment to his Store Manager position at Benton Parkway. He applied for a Store Manager position in Bryant, Arkansas, but was not hired for the job. He was told that, by the time he applied, Dollar General had already made a conditional offer of employment to another person.[18]
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> While he was still on leave, Mr. Scudder had applied for Social Security Disability Insurance (SSDI) benefits with the Social Security Administration (SSA). On December 6, 2016, a Social Security Administrative Law Judge approved his application for benefits, finding that he became totally disabled on December 10, 2014. Mr. Scudder was awarded SSDI benefits, which he continues to receive.[19]

Scudder's appeal to the 8th Circuit

Scudder filed a timely appeal with the 8th Circuit. In his scholarly opinion, Judge Shepherd wrote:

> Scudder contends he did not waive his right to reemployment under USERRA because he never resigned from Dollar General. He further argues that his application for the store manager position at the Bryant store constituted an application for reemployment as defined by USERRA. Thus, he claims, the district court erred in granting Dollar General summary judgment on his USERRA claim.
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> "We review de novo the district court's grant of summary judgment, viewing all evidence and drawing all reasonable inferences in favor of [Scudder]." *Odom v. Kaizer,* 864 F.3d 920, 921 (8th Cir. 2017) (internal quotation marks omitted). "Summary judgment is proper when there is no genuine dispute of material fact and the prevailing party is entitled to judgment as a matter of law." Id. (internal quotation marks omitted).
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> "USERRA protects returning veterans and other uniformed service members when transitioning to civilian life, requiring reemployment in either the same position 'or a

[18] As is explained below, the 8th Circuit panel reversed Magistrate Judge Deere's finding that Scudder did not make a proper application for reemployment.

[19] *Scudder v. Dolgencorp, LLC,* 2017 U.S. Dist. LEXIS 13200 (E.D. Ark. Aug. 18, 2017). In the second quoted paragraph, Magistrate Judge Deere held that Scudder was *estopped* to assert that he had the right to reemployment with Dolgencorp because he had already contended to another government agency (the SSA) that he was totally disabled. The 8th Circuit panel reversed Magistrate Judge Deere on this point also. I will discuss the estoppel issue in detail in Law Review 20005 (January 2020).

position of like seniority, status and pay, the duties of which the person is qualified to perform.'" *Lisdahl v. Mayo Found.,* 633 F.3d 712, 717 (8th Cir. 2011) (quoting 38 U.S.C. § 4313(a)(2)(A)). Under USERRA, the returning service member must give advance notice of his service and, upon completion of that service, "submit[] an application for reemployment" within an allotted time frame. 38 U.S.C. § 4312(e)(1)(D). The service member "bears the burden of proving that he has satisfied the statutory requirements and is entitled to receive reemployment rights." *Shadle v. Superwood Corp.,* 858 F.2d 437, 439 (8th Cir. 1988). "Because USERRA was enacted to protect the rights of military service members and veterans[,] it is construed broadly and in favor of its military beneficiaries." *Clegg v. Arkansas Department of Corrections,* 496F.3d 922, 931 (8th Cir. 2007) (internal quotation marks omitted).

We first consider whether Scudder waived his right to reemployment under USERRA by resigning from Dollar General. A service member waives his right to reemployment by "clearly and unequivocally" resigning. *Paisley v. City of Minneapolis,* 79 F.3d 922, 931 (internal quotation marks omitted) (finding clear and unequivocal resignation where service member wrote a letter to employer stating, "I hereby tender my resignation . . ."). During Scudder's phone conversation with Morentin, he told her he wanted to speak with someone at Dollar General to "find out if [he] need[ed] to put in [his] **two weeks [notice] because [he couldn't] return to work" on April 2,**[20] 2016, the date his approved leave ended. Morentin understood this conversation to be Scudder's resignation and reported it as such to Dollar General.

On appeal, Dollar General argues that Scudder clearly and unequivocally resigned. But Scudder adamantly denies resigning, claiming he was simply trying to find out what he needed to do to maintain his job even though he would not be able to return to work on April 2. His claim is plausible given that he asked Morentin "if" he needed to put in his two weeks notice. A reasonable factfinder could thus conclude that Scudder did not "clearly and unequivocally" resign. Id. (internal quotation marks omitted); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) (holding a genuine dispute of material fact exists when "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party"). Because there is a genuine dispute of material fact as to Scudder's resignation, we find summary judgment is not appropriate on the basis of waiver.

We next consider whether Scudder's application for the store manager position at Dollar General's Bryant store constituted an "application for reemployment" under USERRA. 38 U.S.C. § 4312(a)(3). USERRA does not mandate the application be in a particular form, or even in writing, but it "should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer." 20 C.F.R. § 1002.118. In determining whether an application is sufficient, "the critical inquiry always must be whether, considering all the circumstances, a reasonable employer would be put on notice that the applicant is a returning veteran who seeks reemployment." Shadle, 858 F.2d at 440. "What constitutes adequate notice . . . will vary from case to case, depending on the size of the firm, the number of employees, the length of time the returning veteran has been away, and a myriad of other factors." Id. "No

[20] Emphasis by bold in original.

bright-line test has been fashioned to resolve this issue." Id. at 439. "Rather, [it requires] a case-by-case determination focusing on the intent and reasonable expectations of both the former employee and employer, in light of all the circumstances." Id.

Viewing the evidence in the light most favorable to Scudder, *we conclude that a reasonable jury could find that Scudder's application for the store manager position at the Bryant store was sufficient to give a reasonable employer adequate notice that Scudder was a returning service member seeking reemployment.*

Both parties agree Scudder did not have to apply to the same position in which he was previously employed but need only apply for "*a* position of employment" with Dollar General. 38 U.S.C. § 4312(e)(1) (emphasis added). In his application submitted through Dollar General's online portal, Scudder indicated he was a former store manager at Dollar General's Benton store, but was "let go from Dollar General after returning from Afghanistan injured and no one from the corporation would ever contact [him] back." Dollar General claims that "returning from Afghanistan injured" does not indicate uniformed service, but we find this argument is insufficient to support summary judgment, particularly considering Scudder listed the National Guard as a previous employer on his application. Moreover, as Scudder's previous employer, Dollar General had access to his employment records and could confirm the dates of his prior employment and military leave. Because Scudder applied directly to Dollar General—indicating on his application that he was previously employed by Dollar General and was seeking a position with Dollar General following his return from military service—we conclude *he did just enough to create a submissible case* on whether he submitted an application for reemployment under USERRA. Cf. Shadle, 858 F.2d at 440 (finding that asking for a job application and to speak to managers was "hardly enough to put a reasonable employer on notice").

Dollar General alleges Scudder should have sought reemployment through Matrix. Scudder knew Matrix was Dollar General's leave coordinator and had coordinated his military leave through Matrix for years. However, USERRA requires only that the returning service member "submit[] an application for reemployment to[] [his pre-service] employer." 38 U.S.C. § 4312(a)(3). It does not require application through a particular channel. See id.; see also 20 C.F.R. § 1002.119 ("The application must be submitted to the pre-service employer or to an agent or representative of theemployer who has apparent responsibility for receiving employment applications."). Scudder submitted his application directly to Dollar General, his "pre-service employer," through its online portal for employment applications. 20 C.F.R. § 1002.119. Although Dollar General may have preferred Scudder to seek reemployment through Matrix, he was under no obligation to do so. We therefore conclude that *Dollar General is not entitled to judgment as a matter of law on Scudder's USERRA claim.*[21]

It should be noted that in the District Court Scudder and Dolgencorp filed cross motions for summary judgment. The Magistrate Judge granted Dolgencorp's motion for summary judgment and denied Scudder's motion. On appeal, the 8th Circuit panel *did not hold that Scudder was*

[21] *Scudder,* 900 F.3d at 1004-06 (emphasis by italics supplied).

entitled to summary judgment. The appellate court did not find that no reasonable jury could find for Dolgencorp. Rather, the 8th Circuit panel only found that the Magistrate Judge erred in granting Dolgencorp's motion for summary judgment because Dolgencorp had not shown that it was entitled to judgment as a matter of law. The appellate panel did not reverse the decision for Dolgencorp and render a decision for Scudder. Rather, the appellate panel reversed the judgment for Dolgencorp and remanded the case to the District Court for a trial on the merits.

Resolution on remand

On remand, Magistrate Judge Beth M. Deere resolved this case as follows:

> The parties have jointly filed a stipulation of dismissal with prejudice requesting that the Court dismiss this case. (Docket entry #61) Accordingly, the case is hereby dismissed, with prejudice, with each party bearing their own costs and expenses.
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> The trial scheduled for May 30, 2019, is canceled, and the Clerk is directed to close this case.
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> IT IS SO ORDERED this 22nd day of May 2019.[22]

In other words, the case settled. I do not know how much money Scudder received, nor do I know whether the settlement provided for Scudder to return to employment with Dolgencorp. It is likely that Scudder agreed to a confidentiality clause in the settlement agreement and that he is thereby precluded from divulging the terms of the settlement. This case is over.

Kudos to Scudder's attorney

I congratulate attorney Ray Baxter of Benton, Arkansas for his imaginative, diligent, and ultimately successful (at least in part) representation of Arkansas Army National Guard Sergeant Samuel Scudder.

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

[22] *Scudder v. Dolgencorp, LLC,* 2019 U.S. Dist. LEXIS 86019 (E.D. Ark. May 22, 2019).

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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