

## LAW REVIEW<sup>1</sup> 20003

January 2020

### Favorable USERRA Decision by the 8<sup>th</sup> Circuit—Part 2 What Is an Application for Reemployment?

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

[About Sam Wright](#)

1.3.1.3—Timely application for reemployment

1.3.2.1—Prompt reinstatement after service

1.3.2.9—Accommodations for disabled veterans

***Scudder v. Dolgencorp, LLC, 900 F.3d 1000 (8<sup>th</sup> Cir. 2018).***<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 recent decision of the United States Court of Appeals for the 8<sup>th</sup> 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.

As I have explained in Law Review 20002, the immediately preceding article in this “Law Review” series, Samuel Scudder left his job as store manager of a Dollar General<sup>4</sup> store in Benton, Arkansas when he was called to active duty as a Sergeant in the Arkansas Army National Guard. He deployed to Afghanistan and was wounded in action. If I were representing Scudder, I would argue that he made three timely applications for reemployment.

On 3/31/2016, he had a conversation (apparently by telephone) with Jessica Morentin, a claims examiner for Matrix Absence Services, the contractor that Dolgencorp had retained to receive and process all employee requests for leave of various kinds. Matrix had granted him leave until 4/1/2016. Scudder carefully explained to Morentin that he had been wounded in Afghanistan and that he was unable to return to work the next day because he was still recuperating from his wounds. Morentin misconstrued Scudder’s communication as a “resignation” and so advised the employer.

On 4/5/2016, after receiving an exit survey from Dolgencorp, Scudder sent the company an e-mail. He explained that he had left his Dolgencorp job when he was called to active duty for Operation Enduring Freedom and that he had been deployed to Afghanistan, where he was wounded in action. He made clear that he wanted to return to Dolgencorp but was frustrated that nobody at the company would communicate with him. The company ignored this e-mail.

On 4/24/2016, Scudder applied on-line for the vacant store manager position in Bryant, Arkansas. In his application, he stated that he had previously managed a Dollar General store in a nearby city and that he was “let go after returning from Afghanistan wounded and no one from the corporation would ever contact me back.” He also listed the Army as his most recent employer.

Because he had been on active duty more than 180 days, Scudder had 90 days (starting on the date of release from service) to apply for reemployment.<sup>5</sup> Thus, each of the three communications listed above constituted a timely application for reemployment. Two sections of the Department of Labor (DOL) USERRA Regulation address the required content of an application for reemployment and to whom the application must be addressed:

#### **Is an application for reemployment required to be in any particular form?**

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she

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<sup>4</sup> Dollar General stores are owned and operated by Dolgencorp, LLC, the defendant in this case.

<sup>5</sup> 38 U.S.C. 4312(e)(1)(D).

seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.<sup>6</sup>

### To whom must the employee submit the application for reemployment?

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The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest.<sup>7</sup>

In his scholarly decision, joined by his two colleagues, Judge Shepherd wrote:

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 the employer 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.<sup>8</sup>

*But please note that the 8<sup>th</sup> Circuit panel did not hold that Scudder's application for reemployment was proper.* Rather, the appellate panel held that Scudder "did just enough" to preclude summary judgment for Dolgencorp on the application for reemployment issue.<sup>9</sup> The appellate panel found that the Magistrate Judge was wrong to grant summary judgment for the employer (Dolgencorp) on the application for reemployment issue; it did not hold that the Magistrate Judge should have granted summary judgment for Scudder on that issue. There were material issues of fact that precluded summary judgment for Dolgencorp or for Scudder on that issue. There would have been a trial on that issue and other pending issues, but instead

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<sup>6</sup> 20 C.F.R. 1002.118 (bold question in original).

<sup>7</sup> 20 C.F.R. 1002.119 (bold question in original).

<sup>8</sup> *Dolgencorp, LLC*, 1000 F.3d at 1006.

<sup>9</sup> *Scudder*, 900 F.3d at 1005.

on remand the parties reached a settlement and jointly asked the District Court to dismiss the case, which happened.

A lot of trouble and expense could have been avoided if the Army or the Arkansas National Guard had assisted Sergeant Scudder by appointing a judge advocate to advise him of his rights and his options and to assist him in drafting and sending a proper application for reemployment letter to the employer by certified mail.<sup>10</sup> Perhaps it is unrealistic to expect active duty or Reserve or National Guard judge advocates to give this sort of individual attention to Guard and Reserve service members returning from deployment, even when they are returning as wounded warriors. Accordingly, here are two sample letters.

The first letter is a simple application for reemployment. Strictly speaking, using this draft is not required, because USERRA does not require that the application for reemployment follow any specific format or even that the application be in writing. It should not be necessary to inform the employer of its legal obligations, but this letter does exactly that, citing specific sections of the statute and the Department of Labor (DOL) USERRA Regulation and case law.

The second sample letter is for the situation where the returning veteran is unable to apply for reemployment within 90 days after leaving active duty because he or she is hospitalized or convalescing from a wound, injury, or illness incurred or aggravated during the period of service. Under those circumstances, the deadline to apply for reemployment can be extended by the period of hospitalization or convalescence, and the period of hospitalization or convalescence can last up to two years.<sup>11</sup>

**Sample application for reemployment letter:**

Ms. Jane Doe  
Human Resources Director  
XYZ Corporation  
4006 Betsy Lane  
Anytown, CA 96584

Re: Application for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301 to 4335

Dear Ms. Doe:

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<sup>10</sup> Please see Law Review 20004 (January 2020).

<sup>11</sup> 38 U.S.C. 4313(a)(3).

This letter is my formal application for reemployment under USERRA, a federal law that you can find in title 38 of the United States Code, at sections 4301 through 4335. I am entitled to prompt reemployment because I meet the five USERRA conditions:

- a. I left my civilian job with your organization to perform service in the uniformed services as defined by USERRA. 38 U.S.C. 4312(a).
- b. I gave you (the employer) prior oral or written notice that I was leaving my job to perform uniformed service. 38 U.S.C. 4312(a)(1).
- c. I have not exceeded the five-year limit on the duration of permissible periods of uniformed service, relating to my employer relationship with your organization. 38 U.S.C. 4312(c).
- d. I was released from the period of service without having received a disqualifying bad discharge from the military. 38 U.S.C. 4304.
- e. I am hereby making a timely application for reemployment. After a period of service of more than 30 days but less than 181 days, I must submit my application for reemployment within 14 days after my release from the period of service. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, I have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

Because I meet the five USERRA conditions, I am entitled to *prompt reemployment*, generally within 14 days after my application for reemployment. 20 C.F.R. 1002.181. This is a reference to section 1002.181 of title 20 of the Code of Federal Regulations. This is one section of the Department of Labor (DOL) USERRA Regulation.

I am entitled to prompt reinstatement even if there is no present vacancy at your organization and even if reemploying me necessarily means that another employee must be displaced. See *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993); *Cole v. Swint*, 961 F.2d 58, 60 (5<sup>th</sup> Cir. 1992); and *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 703-04 (8<sup>th</sup> Cir. 1983).

Upon reemployment, I am entitled to be treated, for seniority and pension purposes, *as if I had been continuously employed with your organization during the entire time that I have been away from work for service*. 38 U.S.C. 4316(a), 4318.

For more information about USERRA, I invite your attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). This is part of the website of the Reserve Organization of America (ROA). You will find more than 1,300 "Law Review" articles about USERRA, along with a detailed Subject Index to facilitate finding articles about very specific topics.

Thank you for your prompt attention to my application for reemployment and thank you for your thoughts and prayers while I have been away from work answering the country's call. I am looking forward to returning to work as soon as possible.

Sincerely,

Audie Murphy

**Sample letter to send to your employer if, upon reemployment, you are hospitalized or convalescing from a wound, injury, or illness incurred or aggravated during your relevant period of uniformed service**

Ms. Jane Doe  
Human Resources Director  
XYZ Corporation  
4006 Betsy Lane  
Anytown, CA 96584

Dear Ms. Doe:

I left my job on or about **[date]** with your organization to perform service in the uniformed services, after giving your organization prior oral or written notice that I was leaving to perform service. While on active duty, I was wounded in action, and I am unable to return to work within the ordinary timeframe under the Uniformed Services Employment and Reemployment Rights Act (USERRA) because I am still hospitalized or convalescing from my wounds.

Under section 4312(e)(2)(A) of USERRA, 38 U.S.C. 4312(e)(2)(A), the deadline for a person like me (who is hospitalized or convalescing from a wound sustained on active duty) to apply for reemployment is extended during the person's hospitalization or convalescence, and the period of hospitalization or convalescence can extend for up to two years. I need to utilize this provision because I am still recovering from my wounds.

I hope and expect to recover from my wounds and to return to work for your organization. I will keep you informed of my progress. In the meantime, thank you for your prayers for my recovery.

Sincerely,

Audie Murphy

***Note: In the military the word "wound" means an injury sustained by a service member in actual combat with an enemy of the United States, and a service member who has been wounded in action is entitled to a Purple Heart. Do not claim to have been wounded in action unless that claim is true. The right to an extension of the deadline for you to apply for***

*reemployment, under section 4312(e)(2)(A) of USERRA, is not limited to service members who were wounded in action. It applies to any service member who suffered an injury or illness during the active duty period.*

*Note: This letter is not an application for reemployment, and you are not entitled to reemployment just because you sent this letter. Section 4312(e)(2)(A) is an extension of the normal deadline to apply for reemployment after a period of uniformed service. You are not entitled to reemployment until you make a timely application for reemployment, under the regular or extended deadline, and meet the other four USERRA conditions. Please see Law Review 16093 (September 2016).*

### **Please join or support ROA**

This article is one of 1900-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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.

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://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:

Reserve Officers Association  
1 Constitution Ave. NE  
Washington, DC 20002