

## LAW REVIEW<sup>1</sup> 20004

January 2020

### Favorable USERRA Decision by the 8<sup>th</sup> Circuit—Part 3 The Army and the National Guard Should Help the Wounded Warrior To Secure his or her USERRA Rights

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

1.4—USERRA enforcement

*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 (January 2020), Sergeant Samuel Scudder of the Arkansas Army National Guard had several important decisions to make when he returned wounded from his call-up and deployment to Afghanistan in 2014. Although the employer, through its “absence management” contractor, had granted him “military leave” only through April 1, 2016, he had no obligation to return to work at that time or apply for reemployment.

After a period of uniformed service lasting longer than 180 days, the returning veteran (like Scudder) has 90 days to apply for reemployment, and the 90-day deadline does not start running until the individual leaves active duty.<sup>4</sup> If Scudder was hospitalized or convalescing from a wound, injury, or illness incurred or aggravated during his active duty period, he had the right to delay his application for reemployment until he completed his convalescence, and the convalescence period could last up to two years.<sup>5</sup>

Scudder had valuable rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), but he understood his rights only vaguely, if at all. Judge advocates of the Army or the Arkansas National Guard should have briefed him in detail about his rights and should have assisted him in exercising and enforcing his rights, but no such effort was made for Scudder or other wounded warriors who were National Guard or Reserve members.

The Army and the Arkansas National Guard poorly served Sergeant Scudder and other disabled veterans. Scudder needed detailed information about USERRA and about his options, but nobody provided him this information. There was ample time to provide him this information during the time that he was at Fort Leonard Wood in the wounded warrior battalion. When he was released from Fort Leonard Wood and returned to Arkansas, the Arkansas National Guard should have offered him individual advice and assistance. The Adjutant General of Arkansas should have gotten personally involved and should have contacted Scudder’s employer to demand that it comply with USERRA.

In 2007, Major General Scott C. Black<sup>6</sup> wrote:

No Soldier is more deserving of our best efforts than a Soldier wounded in combat. I encourage every JAG Corps member, military and civilian alike, to reach out to our wounded Soldiers and their families in every way possible.

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<sup>4</sup> 38 U.S.C. 4312(e)(1)(D).

<sup>5</sup> 38 U.S.C. 4312(e)(2).

<sup>6</sup> Scott C. Black was the Judge Advocate General of the Army (TJAG) from 10/1/2005 until 10/1/2009. He was on active duty as the TJAG when Congress upgraded the Army, Air Force, and Navy TJAG positions from O-8 (Major General or Rear Admiral) to O-9 (Lieutenant General or Vice Admiral). He was upgraded to Lieutenant General and retired in that rank, but he was still a Major General when he wrote these words.

It is unfortunate that General Black's words have been forgotten by today's judge advocates in the Army and other services.

For 25 years, from 1982 (when I left active duty and went to work for the Department of Labor (DOL) as an attorney and became aware of the reemployment statute) until 2007 (when I retired from the Navy Reserve with 33 years of commissioned service), I spoke to Reserve and National Guard units several times per month, on my own drill weekend and other weekends as well, about the reemployment statute. I am disappointed to say that there is no Reserve or National Guard judge advocate engaging in this activity today.<sup>7</sup> I have devoted my legal career and my military career to helping service members exercise and enforce their legal rights, especially their rights under USERRA and the predecessor reemployment statute.

In 1997, I initiated the "Law Review" column in the magazine and website of the Reserve Officers Association. Through these articles, I have sought to educate service members and their lawyers about their legal rights, and about how to exercise and enforce those rights.

#### **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.

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<sup>7</sup> If any reader is aware of such a judge advocate, please let me know.

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