

Recent Favorable USERRA Precedent—Part 5 USERRA Rights of Wounded Warriors

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- 1.1.3.3—USERRA applies to National Guard service
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***Scudder v. Dolgencorp, LLC*, 900 F.3d 1000 (8th Cir. 2018).**³

The last four “Law Review” articles (Law Reviews 20002 through 20005) have dealt with the *Scudder* case, an interesting and important case arising under the Uniformed Services

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.

Employment and Reemployment Rights Act (USERRA). I have decided to write one more article about this case. This final article addresses the obligations of employers of Reserve and National Guard service members who leave civilian jobs (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services as defined by USERRA, who meet the five USERRA conditions for reemployment,⁴ and who suffered a wound, injury, or illness incurred in or aggravated during the person's relevant period of uniformed service.

In 2014, Samuel Scudder was a Sergeant in the Arkansas Army National Guard when he was involuntarily called to active duty and deployed to Afghanistan, where he was wounded in action. Scudder left his civilian job as a store manager for Dolgencorp, LLC when he was called to the colors. He apparently met the five USERRA conditions, but there was some doubt about the sufficiency of his application for reemployment.⁵ The doubts about Scudder's compliance with the five USERRA conditions, especially the application for reemployment condition, were rendered moot when the parties (Scudder and Dolgencorp) agreed to a settlement and jointly moved the District Court to dismiss the case with prejudice.⁶

If the parties had not settled, what were Dolgencorp's obligations to Scudder as a returning wounded warrior? The pertinent USERRA section is as follows:

In the case of a person who has a disability incurred in, or aggravated during, such service, and who (*after reasonable efforts by the employer to accommodate the disability*) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—

- (A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform *or would become qualified to perform with reasonable efforts by the employer; or*
- (B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with the circumstances of such person's case.⁷

⁴ As I have explained in detail in Law Review 15116 (December 2015) and other articles, a person must leave a civilian job to perform uniformed service and must give prior oral or written notice to the employer. The person's cumulative period or periods of uniformed service, relating to his or her employer relationship with the specific employer, must not have exceeded the five-year limit set forth in 38 U.S.C. 4312(c). All involuntary service and some voluntary service are excluded from the computation of the five-year limit. Please see Law Review 16043 (May 2016). The person must have been released from service without having received a disqualifying bad discharge from the military. 38 U.S.C. 4304. After release, the person must have made a timely application for reemployment with the pre-service employer. 38 U.S.C. 4312(e).

⁵ Please see Law Reviews 20002 and 20003 (January 2020).

⁶ See *Scudder v. Dolgencorp, LLC*, 2019 U.S. Dist. LEXIS 86019 (E.D. Ark. May 22, 2019).

⁷ 38 U.S.C. 4313(a)(3) (emphasis supplied).

When he was called to the colors, Scudder was a store manager for a Dollar General store in Benton, Arkansas. If his civilian employment had not been interrupted by uniformed service, it is virtually certain that he would have remained in the store manager position. Under section 4313(a)(3), Dolgencorp is required to make “reasonable efforts” to qualify Scudder for the store manager position or a position of like seniority, status, and pay. If there is no position of like seniority, status, and pay, Dolgencorp must reemploy Scudder in the “closest approximation” position.

Section 4303 of USERRA defines 16 terms used in this law, including the term “reasonable efforts” and the term “undue hardship.” Section 4303 defines the term “reasonable efforts” as follows: “The term ‘reasonable efforts’, in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, *that do not place an undue hardship on the employer.*”⁸

Section 4303 defines the term “undue hardship” as follows:

The term “undue hardship”, in the case of actions taken by an employer, means actions requiring *significant difficulty or expense*, when considered in light of—

- (A) the nature and cost of the action needed under this chapter;
- (B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operations of the facility;
- (C) *the overall financial resources of the employer*; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and
- (D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the employer.⁹

Dolgencorp is a wholly owned subsidiary of Dollar General Corporation, which is a huge and very profitable corporation. Dollar General has been described as follows:

Dollar General Corporation is an American chain of variety stores headquartered in Goodlettsville, Tennessee. As of July 2018, Dollar General operates 15,000 stores in the continental United States.

⁸ 38 U.S.C. 4303(10) (emphasis supplied).

⁹ 38 U.S.C. 4303(15) (emphasis supplied).

The company began in 1939 as a family-owned business called J.L. Turner and Son in Scottsville, Kentucky, owned by James Luther Turner and Cal Turner. In 1955, the name changed to Dollar General Corporation and in 1968 the company went public on the New York Stock Exchange. Fortune 500 recognized Dollar General in 1999 and in 2018 [the company] reached #123. Dollar General has grown to become one of the most profitable stores in the rural United States with revenue reaching around \$21 billion in 2017. ...

Dollar General has over 15,000 stores in 44 states and approximately 129,000 employees. Dollar General also has 15 distribution centers in 14 states with 2 additional centers either under construction or planned.¹⁰

As a huge and very profitable company, the defendant is capable of and is required to make considerable efforts for wounded warriors like Scudder. If Scudder cannot become qualified for the store manager position, the employer must reemploy him in some other position for which he is qualified or can become qualified. With 15,000 stores and 129,000 employees, Dollar General must have a position for which Scudder can become qualified.

For further information about the USERRA rights of wounded warriors, I invite the reader's attention to Law Review 0640 (December 2006) and Law Review 0854 (November 2008).

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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 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

¹⁰ https://en.wikipedia.org/wiki/Dollar_General.

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.

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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:

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