

**LAW REVIEW<sup>1</sup> 20007**  
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**Important New USERRA Case—Part 1**

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

[About Sam Wright](#)

- 1.1.1.7—USERRA applies to state and local governments
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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, now doing business as the Reserve Organization of America (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).

***Jackson v. City of Birmingham, 364 F. Supp. 3d 1310 (N.D. Ala. 2019).***<sup>3</sup>

#### **Facts<sup>4</sup>**

Eric Jackson was an enlisted member of the Alabama Army National Guard<sup>5</sup> when he reported to federal active duty on 2/13/2012. In this lawsuit, he claims that his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>6</sup> were violated by the City of Birmingham, his civilian employer.

Jackson was hired by the City of Birmingham as a parking enforcement officer (PEO) in early 2012. Almost immediately after he started this new job, Jackson learned that he was being called to active duty, with his ARNG unit, for deployment to Afghanistan for one year.<sup>7</sup> As a new PEO, Jackson was closely supervised for the first few days and then worked on his own. His last day at work was Thursday, 2/9/2012. He reported to active duty on Monday, 2/13/2012.<sup>8</sup> After pre-deployment training in the United States, Jackson and the rest of the unit deployed to Afghanistan.

A year later, in February 2013, Jackson and the unit returned to Alabama. Other unit members were released from active duty, to return to their homes and civilian jobs, but Jackson was retained on active duty for treatment of Post Traumatic Stress Disorder (PTSD), and he was transferred to the Warrior Transition Battalion at Fort Gordon, Georgia. Jackson was retained

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<sup>3</sup> This is a recent decision of Judge Madeline Hughes Haikala of the United States District Court for the Northern District of Alabama, denying the defendant City of Birmingham's motion for summary judgment. The citation means that you can find this published decision in Volume 364 of *Federal Supplement Third Series*, starting on page 1310.

<sup>4</sup> The facts in this article come directly from Judge Haikala's decision. I have no personal knowledge of the facts.

<sup>5</sup> Our nation has seven Reserve Components of the armed forces. In ascending order of size, they are the Coast Guard Reserve (USCGR), the Marine Corps Reserve (USMCR), the Navy Reserve (USNR), the Air Force Reserve (USAFR), the Air National Guard (ANG), the Army Reserve (USAR), and the Army National Guard (ARNG). The ARNG and ANG are hybrid federal-state entities, while the other five components are purely federal entities. As a member of the *Alabama ARNG*, the modern-day equivalent of the state militia, Jackson was subject to the call of the Governor, under state law, for state emergencies like hurricanes, fires, riots, etc. As a member of the *ARNG of the United States*, Jackson was subject to call-up by the President for national military emergencies, as occurred in this case.

<sup>6</sup> See footnote 2.

<sup>7</sup> It is not clear when Jackson learned that he was being called to active duty or what he may have told the City of Birmingham about his imminent call-up at the time he was hired. On 2/7/2012, he received a letter from the National Guard—a letter that he was instructed to provide to his employer, which he did. It would have been unlawful for the City to discriminate against Jackson in initial employment based on his obligation to perform service, even imminently. See 38 U.S.C. 4311(a).

<sup>8</sup> Jackson was not required to work at his civilian job until the day before he reported to active duty. He was entitled to at least a few days to put his affairs in order before reporting to a lengthy active duty period. See 20 C.F.R. 1002.74(b).

on active duty for an additional year, until 2/24/2014, when he was released from active duty and honorably discharged from the Army with a disability rating because of the PTSD diagnosis.

Because Jackson had been on active duty for more than 180 days, the deadline for him to apply for reemployment was 90 days after his date of release from duty.<sup>9</sup> If he had been (at the time of his release from active duty) hospitalized or convalescing from a wound, injury, or illness incurred or aggravated during his active duty, he could have waited to submit his application for reemployment until after the hospitalization or convalescence ended, and the period of hospitalization or convalescence could last up to two years.<sup>10</sup> This provision for an extended deadline to apply for reemployment certainly applies to service members and veterans who are suffering from PTSD as a result of their service.

The City of Birmingham characterizes PEOs as “classified employees,” and classified employees are required to serve a 12-month probationary period after they are hired, under section 2.13 of the City’s Supplemental Personnel Policies & Procedures. The City’s Military Leave Resolution 392-08 provides that a *permanent* City employee who has been called to duty and deployed to a war zone will receive his or her full salary from the City, without regard to whether the City salary is greater than or less than the military salary, during the entire period of the deployment. The Resolution defines a “permanent” employee as one who has completed his or her mandatory 12-month probationary period. Although Jackson worked for the City only for a few days before he was called to the colors, he received his full City salary during his two-year deployment.<sup>11</sup>

In her opinion, Judge Haikala set forth this additional recitation of the facts:

In January of 2014, the City gave Mr. Jackson a merit pay increase based on the amount of time that he had been employed with the City. (Doc. 23-1, p. 20; Doc. 23-4).

On February 18, 2014, Mr. Goodman emailed Mr. Dawkins, Mr. Martinez, and Assistant Traffic Engineer Sedrick Rutledge. (Doc. 23-5, p. 1). Mr. Goodman attached to the email pictures of Mr. Jackson. (Doc. 23-5, pp. 2-9). The email states: "Thought these pics of Parking Officer Eric Jackson would be of interest. As far as I know he is still on Traffic Engineering budget receiving his normal pay. Serious abuse of taxpayer dollars. Also see his CD under (Google.... Visionary Alter Ego)." (Doc. 23-5, p. 1).

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<sup>9</sup> 38 U.S.C. 4312(e)(1)(D).

<sup>10</sup> 38 U.S.C. 4312(e)(2)(A).

<sup>11</sup> USERRA does not require the civilian employer to pay the employee for time not worked because of service, but USERRA does not supersede or override a local ordinance, state law, or employer policy that provides *greater or additional rights*. 38 U.S.C. 4302(a).

On February 24, 2014, the Army honorably discharged Mr. Jackson from service for medical reasons. (Doc. 20-1, p. 25; Doc. 20-20). After his discharge, Mr. Jackson received a disability rating because of his PTSD diagnosis. (Sealed Doc. 27-3, p. 8; Doc. 31-1, 5).

On March 10, 2014, in an email to Mr. Goodman, the payroll coordinator for the City's traffic engineering department explained that Mr. Jackson had 90 days from the date of his discharge from the Army to report to work, so Mr. Jackson would return to work in May 2014. (Doc. 22-11). Mr. Goodman responded, "[n]ot cool with me at all. However, someone else calls the shots on these situations. He's milking it! If he can handle all of his other affairs he should be able to come to work." (Doc. 22-11).

In a message dated March 11, 2014, Mr. Dawkins explained to Mr. Goodman that under federal law, the City must give Mr. Jackson 90 days from the end of his military service to report to work. (Doc. 23-6, p. 1). Mr. Goodman responded:

I know the policy allows Mr. Jackson to report 90 days after the end of military duty. I just have a problem with this whole flagrant abuse of the system. Anyone who can conduct a business, record rap videos and handle all of the other situations that he is managing has to be somewhat sound. I wish Mrs. Polk would look into this whole policy of paying personnel a full salary while they're in a military status. I think we're creating a loophole for abusers.

(Doc. 23-7, p. 1).

Mr. Goodman continued to exchange emails with Mr. Dawkins about the rules and policies governing Mr. Jackson's return to work, and Mr. Goodman wrote that he would like to deny Mr. Jackson vacation "because we need him back asap." (Doc. 22-12, p. 1).

Consistent with arrangements that he made with the City, Mr. Jackson returned to work on May 27, 2014. (Doc. 20-1, p. 27; Doc. 20-24; Doc. 20-21; Doc. 20-22; Doc. 31-1, ¶ 4). When he returned to work, Mr. Jackson did not consider himself a probationary employee because he had been employed with the City for more than two years, and based on the City's June 14, 2012 letter, he received benefits to which only permanent, non-probationary employees were entitled. (Doc. 31-1, ¶ 4; *see also* Doc. 20-19; Doc. 21-3, p. 1). For the first week he was back on duty, a supervisor provided instructions to Mr. Jackson, but Mr. Jackson worked in the field independently. (Doc. 31-1, ¶ 4).

When he returned to work, Mr. Jackson was able to issue citations, patrol his assigned zone, and communicate with drivers. (Doc. 31-1, ¶ 6.b-e). Although he could perform his job functions, the medication that Mr. Jackson took to treat his PTSD caused sleeplessness which, in turn, caused Mr. Jackson, once he finally fell asleep, to sleep

through alarms. (Doc. 31-1, ¶¶ 5, 6). Mr. Jackson's sleeplessness also made him "more easily triggered by loud noises and confrontation," and "loud noises or argumentative people increased [his] stress level." (Doc. 31-1, ¶¶ 5, 6.d). The effects of Mr. Jackson's PTSD medication caused him to miss work. Between May 27, 2014 and August 6, 2014, Mr. Jackson was absent 8 times; he arrived to work late 11 times, and he left work early 7 times. (Doc. 20-1, pp. 27, 29-33, 37; Doc. 20-24; Doc. 20-27). According to Mr. Jackson, when he was absent or late, he "always called or texted Jose Martinez or Tiwana Bailey in advance," and when he left work early, he "always obtained permission from a supervisor first." (Doc. 31-1, ¶ 9).

When Mr. Jackson began having attendance issues, he talked to Mr. Martinez and Mr. Goodman "about what [the City] could do to help him out." (Doc. 22-1, p. 16). Mr. Jackson explained that he had PTSD, and he "had problems with loud noises, popping sounds, [and] crowded areas." (Doc. 22-1, p. 16, tp. 64). Mr. Jackson also told Mr. Martinez and Mr. Goodman that "he had problems with confrontations" (Doc. 22-1, p. 16, tp. 64), and "he was having a hard time dealing with the public getting in his face." (Doc. 21-1, p. 9, tp. 36).

Mr. Jackson requested "more frequent breaks" and "flexibility with [his] schedule to allow [him] and [his] doctor to adjust" his PTSD medication. (Doc. 31-1, ¶ 5). Mr. Jackson testified that he needed a "flexible" start time because the medications that he was taking were "constantly being switched out to see . . . which one worked better," and "it was always a different result after every time." (Doc. 20-1, p. 41). According to Mr. Jackson, had the City granted his request for an accommodation, his "attendance would have ultimately conformed to the traditional work schedule for a Parking Enforcement Officer," and his "stress would have been reduced because it would have allowed [his] doctors time to adjust [his] treatment regime[n]." (Doc. 31-1, ¶¶ 6.a., 6.d.).

In July 2014, Mr. Jackson again requested flexibility with his schedule while his doctor adjusted his medication. (Doc. 31-1, ¶ 7). Mr. Jackson asked that the City permit him to use leave for this purpose. (Doc. 31-1, ¶ 7). Mr. Martinez indicated that he would speak to Mr. Goodman about the requests for accommodation, but Mr. Jackson did not receive a response. (Doc. 20-1, p. 41). The City did not evaluate whether Mr. Jackson's requests for accommodation were reasonable. (Doc. 21-1, p. 10, tp. 38; Doc. 23-1, pp. 19, 32; Doc. 31-1, ¶ 7).

On July 3, 2014, Mr. Martinez emailed Mr. Goodman to tell him that Mr. Jackson called in sick. (Doc. 21-10, p. 1). Mr. Goodman responded: "Okay. Thanks [this is] his way of cordially saying he does not want the job. Let's go ahead and get our documentation prepared so that we can turn it over to Mr. Dawkins for dismissal." (Doc. 21-10, p. 1). On July 7, 2014, Mr. Martinez emailed some notes on Mr. Jackson to Mr. Goodman and

explained his (Mr. Martinez's) "concern [that Mr. Jackson] may have personnel [sic] issues outside of work that he may have to resolve to be able to perform the job safely." (Doc. 21-10, p. 1).[2](#)

On July 10, 2014, Charles Pinkney from the City's human resources department emailed Mr. Dawkins about a meeting between Mr. Pinkney and Mr. Martinez concerning Mr. Jackson. (Doc. 23-9). Mr. Pinkney's email states:

This is information in reference from my meeting earlier this morning with Mr. Martinez, in reference to Mr. Eric B. Jackson. Mr. Jackson has just returned from his mobilization and so he is protected from discharge, only in the exception [if] it is for 'CAUSE.'

Please ensure all matters of reprimand are handled in accordance with City of Birmingham and Personnel Board of Jefferson County rules and regulations, and in accordance with that listed below.

As I don't personally handle matters dealing with suspensions for COB employees, I have cc'd Human Resources Director: Peggy Polk and Dept. Dir. Debra Crook.

Any questions in regards to disciplinary actions can be addressed to them.

This information is for your guidance to ensure we remain in compliance with USERRA for active Guard and Reserve personnel.

(Doc. 23-9, p. 1).[3](#)

Also on July 10, 2014, Mr. Goodman presented Mr. Jackson with two written reprimands for absences associated with tardiness and absences on June 5, 2014; June 12, 2014; June 13, 2014; June 20, 2014; June 23, 2014; June 25, 2014; June 27, 2014; June 30, 2014; July 3, 2014; and July 8, 2014. (Doc. 20-32, pp. 1-4). The City placed Mr. Jackson on a corrective observation period through July 10, 2015. (Doc. 20-32, pp. 2, 4). Mr. Martinez and Mr. Goodman signed the reprimands. Mr. Jackson did not sign the reprimands. (Doc. 20-32, pp. 2, 4).

After receiving the reprimands, Mr. Jackson renewed his request for accommodation, telling Mr. Goodman that he needed flexibility with his schedule. (Doc. 20-1, pp. 41-42). Mr. Jackson does not remember what Mr. Goodman said in response to the particular request, but during one discussion about Mr. Jackson's PTSD, Mr. Goodman told Mr. Jackson that he could "tell when it's real" in reference to Mr. Jackson's statements about his PTSD and medication causing him to be late. (Doc. 20-1, p. 42; Doc. 20-1, pp. 54-55).

On July 14 or 15, 2014, Mr. Jackson gave the City a letter from Dr. Barbara Turner. (Doc. 20-1, pp. 39-40; Doc. 31-1, ¶ 7). Dr. Turner is a VA psychiatrist who treated Mr. Jackson for PTSD. (Doc. 20-1, p. 39). Dr. Turner's letter is dated July 14, 2014. (Doc. 20-1, p. 39). In the letter, Dr. Turner confirmed Mr. Jackson's PTSD diagnosis. Dr. Turner stated that she recommended that Mr. Jackson take FMLA leave, but Mr. Jackson did not believe that FMLA leave was necessary because he had made the City aware of his PTSD diagnosis "and may have to report off at times due to his current treatment plan." (Sealed Doc. 27-1, p. 2). Dr. Turner also explained that she recommended increasing the dosage of certain medication, but Mr. Jackson did not agree because he had "already missed time from work due to sedation and oversleeping." (Sealed Doc. 27-1, p. 2). Dr. Turner invited the City to contact her with questions. (Sealed Doc. 27-1, p. 2). About a week after Mr. Jackson gave the City Dr. Turner's letter, Mr. Jackson again tried to follow up with Mr. Martinez to determine whether Mr. Goodman had responded to his (Mr. Jackson's) requests for accommodation, but Mr. Jackson did not receive a response. (Doc. 20-1, p. 42; Doc. 31-1, ¶ 7).

In response to the letter from Dr. Turner, Mr. Dawkins removed Mr. Jackson from the street, assigned him to a desk, and told him to "read the [City's parking] ordinances until we tell you otherwise." (Doc. 20-1, p. 58; Doc. 31-1, ¶ 8). The City required Mr. Jackson to undergo a "fitness for duty" psychological examination at the University of Alabama at Birmingham. (Doc. 23-1, p. 35; Doc. 31-1, ¶ 8). On July 22, 2014, Mr. Jackson completed a psychological assessment online at UAB. (Doc. 20-1, pp. 43-44). Mr. Jackson did not meet with a doctor during this visit, and there was no interactive dialogue with a medical provider. (Doc. 20-1, p. 44).

Also on July 22, 2014, Mr. Jackson received another reprimand for clocking out on July 17, 2014, without his supervisor's approval. (Doc. 20-33, pp. 7-8). Under a section of the report titled "Future Conditions of Employment," the reprimand states:

If you do not report to work or report off to your Supervisor before your designated shift begins, you will be disciplined for lateness or AWOL in accordance with the provisions of the Mayor['s] Administrative Directive WW-1, dated 10-27-75.

If you accumulate 5 lateness[e]s or 3 AWOLs in one 12-month period, you will be dismissed.

(Doc. 20-33, p. 8).

On July 29, 2014, Mr. Dawkins sent Mr. Jackson a Notice of Determination Hearing. (Doc. 23-19, p. 1). The notice explained that the City contemplated personnel action against Mr. Jackson that could result in suspension, demotion, or dismissal. (Doc. 23-19, p. 1). In the

notice, the City indicated that Mr. Jackson had violated a number of Jefferson County Personnel Board rules and regulations for missing work, clocking in late, and leaving work early during July 2014. (Doc. 23-19, pp. 2-3). The City set a determination hearing for August 6, 2014, during which Mr. Jackson could respond to the City's statement. (Doc. 23-19, p. 1). The City later postponed the hearing until August 8, 2014. (Doc. 20-1, p. 37).

On July 30, 2014, the City issued three additional written reprimands to Mr. Jackson for absences or tardiness. (Doc. 20-33, pp. 1-6). Around this time, Mr. Goodman said during a meeting with Mr. Martinez, Ms. Bailey, and Mr. Jackson either "I don't want to deal with him" or "I don't want to deal with that[.]" (Doc. 20-1, p. 55). The remarks concerned Mr. Jackson's PTSD and Mr. Jackson's employment. (Doc. 20-1, p. 55).

On August 9, 2014, one day after the determination hearing, Mr. Dawkins issued a final decision terminating Mr. Jackson's employment effective August 11, 2014. (Doc. 20-37, p. 1). Before his termination, Mr. Jackson was "doing pretty good" in his job. (Doc. 23-24, p. 8, tp. 30). Although he had made some mistakes in writing tickets when he started, he had improved and reduced the mistakes, and he had become one of the City's top performers. (Doc. 20-1, p. 55, tp. 217; Doc. 23-24, p. 8, tpp. 30-31). Mr. Martinez believed that Mr. Jackson was physically and mentally able to work. (Doc. 21-1, p. 26). Ms. Bailey did not observe Mr. Jackson having problems performing his job. (Doc. 23-24, p. 8).

On October 22, 2014, Dr. Adrian Thurstin completed Mr. Jackson's neuropsychological report based on the July 22, 2014 "fitness for duty" assessment. Dr. Thurstin confirmed a PTSD diagnosis. Dr. Thurstin recommended intense, consistent management of the PTSD and a review of Mr. Jackson's medications because the current regimen was not effective, and Dr. Thurstin recommended that Mr. Jackson be allowed to take breaks every 90 minutes to reduce stress. (Sealed Doc. 27-22, pp. 2-3). No one at the City discussed Dr. Thurstin's report with Mr. Jackson. (Doc. 20-1, p. 44). Based on the October 22, 2014 date, the record suggests that the City terminated Mr. Jackson before receiving the completed fitness for duty report.<sup>12</sup>

After he was fired, Jackson sued the City, contending that the firing violated section 4311(a)<sup>13</sup> and section 4316(c)<sup>14</sup> of USERRA. After the discovery process was completed,<sup>15</sup> the City filed a motion for partial summary judgment, under Rule 56 of the Federal Rules of Civil Procedure (FRCP). The judge should grant a motion for summary judgment only if he or she can say, after a careful review of the evidence, that there is *no evidence* (beyond a "mere scintilla") in support

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<sup>12</sup> *Jackson*, 364 F. Supp. 3d at 1315-19.

<sup>13</sup> 38 U.S.C. 4311(a).

<sup>14</sup> 38 U.S.C. 4316(c).

<sup>15</sup> Discovery is the process whereby the parties obtain relevant evidence from each other. The process includes interrogatories, responses to interrogatories, requests for admissions, depositions, etc.

of the non-moving party's claim or defense and that no reasonable jury could find for the non-moving party. As directed by Rule 56, Judge Haikala carefully reviewed the evidence and concluded that there was evidence in the record to support Jackson's claim and that it was not possible to say that no reasonable jury could find for Jackson. Accordingly, Judge Haikala denied the City's motion for summary judgment.

Now, there will be a trial, perhaps with a jury<sup>16</sup> (if Jackson requests a jury), unless the parties settle.

I will complete this article with a series of questions and answers.

**Q: The Alabama Supreme Court has held that the State of Alabama has sovereign immunity and cannot be sued for violating USERRA.<sup>17</sup> The City of Birmingham is a political subdivision of the State of Alabama. How was it possible to bring this case?**

**A:** The amenability of the City of Birmingham to suit in federal court, under USERRA, is a question of federal law, not Alabama law. I invite the reader's attention to the final subsection of section 4323 of USERRA: "In this section [for purposes of USERRA enforcement], the term 'private employer' *includes a political subdivision of a State.*"<sup>18</sup>

Section 4323(i) means that a veteran like Jackson can sue a political subdivision, like the City of Birmingham, in federal court, in his or her own name and with his or her own lawyer, just like suing a private employer. Political subdivisions do not share in the sovereign immunity of states under the 11<sup>th</sup> Amendment of the United States Constitution, and it is possible to sue a political subdivision in federal court.<sup>19</sup>

**Q: Classified employees of the City of Birmingham are considered to probationary for the first two years of employment. Jackson only worked for the City for a few days before he left to go on active duty. Thus, he was still a probationary employee. A probationary employee can be fired for any reason or no reason. How can a guy like Jackson possibly win?**

**A:** The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

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<sup>16</sup> It has been held that a plaintiff claiming that the employer violated USERRA willfully and seeking liquidated damages is entitled to a jury trial. *See Middleton v. City of Chicago*, 578 F.3d 655, 659 (7<sup>th</sup> Cir. 2009).

<sup>17</sup> *See Larkins v. Alabama Department of Mental Health and Mental Retardation*, 806 So.2d 358 (Ala. 2001). Please see Law Review 89 (September 2003) for a detailed discussion of the *Larkins* case.

<sup>18</sup> 38 U.S.C. 4323(i) (emphasis supplied).

<sup>19</sup> *Walker v. Jefferson County Board of Education*, 771 F.3d 748 (11<sup>th</sup> Cir. 2014); *Middleton v. City of Chicago*, 578 F.3d 655 (7<sup>th</sup> Cir. 2009).

**Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.<sup>20</sup>

Moreover, a service member or veteran who meets the five USERRA conditions for reemployment<sup>21</sup> cannot lawfully be discharged, except for cause. Here is the pertinent USERRA section:

A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

- (1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
- (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.<sup>22</sup>

**Q: Jackson's lawyer apparently relied on the Americans with Disabilities Act (ADA). Why not the relevant provision of USERRA?**

**A:** I would have advised Jackson's attorney to rely on the relevant USERRA provision, which 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—

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<sup>20</sup> 20 C.F.R. 1002.41 (bold question in original).

<sup>21</sup> Jackson meets the five USERRA conditions. He left his job to perform uniformed service, and he gave the employer prior oral or written notice. He did not exceed the cumulative five-year limit on the duration of the period or periods of service. He did not receive a disqualifying bad discharge from the military. After release from the period of service, he made a timely application for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

<sup>22</sup> 38 U.S.C. 4316(c).

- (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 circumstances of such person's case.<sup>23</sup>

Under the ADA, the employer is required to make reasonable efforts to enable the disabled person to perform the duties *of that specific position of employment*. USERRA is more generous, in that it also applies to *any other position of employment*. It may be that there is no reasonable accommodation that the City of Birmingham can make that will enable Jackson to be a parking enforcement officer.<sup>24</sup>

Please see Law Review 0640 (December 2006) and Law Review 0854 (November 2008) for further information about the USERRA rights of wounded warriors.

#### **Kudos to Jackson's lawyer**

I congratulate attorney Heather N. Leonard of Birmingham, Alabama for her imaginative and diligent representation of this wounded warrior.

We will keep the readers informed of developments in this interesting and important case.

#### **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.

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<sup>23</sup> 38 U.S.C. 4313(a)(3) (emphasis supplied).

<sup>24</sup> As a parking enforcement officer, he must cope with the loud noises of the street, and he must at least occasionally deal with confrontations with citizens who strenuously object to receiving parking tickets.

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