

DOL-VETS Found in my Favor—Can my Attorney Get the DOL-VETS Report into Evidence?

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

[About Sam Wright](#)

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***Chenoweth v. Yellowstone County*, 2019 U.S. Dist. LEXIS 51845 (D. Mont. March 27, 2019).**³

Q: I am a Master Gunnery Sergeant (E-9) in the Marine Corps Reserve and a member of the Reserve Organization of America (ROA).⁴ I have read with great interest many of your “Law

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, 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.

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 (VRRRA—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 VRRRA 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 VRRRA 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 by Judge Susan P. Watters of the United States District Court for the District of Montana.

⁴ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name:

Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I work for a successful restaurant, Quisling’s Norwegian Seafood Restaurant, which was founded and is owned and operated by Mr. Vidkun Quisling. For many years, Mr. Quisling has given me a hard time about my absences from work for Marine Corps Reserve service, although all the absences are protected by USERRA. Mr. Quisling snapped when I informed him that my unit will likely be mobilized for five to seven months in late 2020. He fired me the day after I informed him of the likely mobilization.

I filed a formal, written USERRA complaint against Mr. Quisling and the restaurant with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency investigated my complaint and found it to have merit and so advised me and Mr. Quisling. I asked DOL-VETS to refer my case file to the United States Department of Justice (DOJ).

Many weeks later, I received a form letter from DOJ, advising me that DOJ would not represent me in suing Mr. Quisling and his restaurant for violating USERRA. The letter said nothing about the rationale for the DOJ decision to decline my request for representation. Does DOJ disagree with the DOL interpretation of the law (USERRA)? Does DOJ believe that the facts do not support DOL’s finding of fact? Is there some kind of financial conflict of interest? Is DOJ just too busy to undertake my case? I have contacted several DOJ attorneys asking them to explain the basis for the declination, but they have resolutely refused to provide me any information. What gives?

A: For decades, it has been DOJ policy not to explain the rationale for declining a service member’s request for representation. I suggest that you not waste any more time trying to obtain that information, because DOJ simply will not provide it, and the information would not help you even if you could somehow obtain it.

Q: After I received the DOJ declination letter, I found an attorney to take my case on a contingent fee basis. If I win and collect money from Quisling, I owe 40% of that money to the lawyer. If I lose, I owe the lawyer nothing.

Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

My lawyer has a copy of the DOL-VETS findings letter, and she wants the DOL-VETS letter introduced as evidence in my lawsuit. Mr. Quisling's lawyer strenuously objects, saying that the letter is "hearsay" and is inadmissible. What do you think?

A: The subject case involves a situation that is like yours. Adam Chenoweth, an enlisted member of the Montana Army National Guard, was fired by his civilian employer, Yellowstone County. Chenoweth filed a complaint with DOL-VETS, and the agency found his complaint to have merit, but DOJ refused his request for representation. Chenoweth retained attorney James A. Williams of Missoula, Montana to represent him. The attorney sought to admit the DOL-VETS findings letter as evidence, and the employer objected.

In her scholarly opinion, Judge Susan P. Watters found the report to be admissible, writing:

Yellowstone County argues the VETS report must be excluded because it is irrelevant, more prejudicial than probative, and incomplete because it contains redactions. Chenoweth responds other district courts have admitted VETS reports as both relevant and probative. Chenoweth further states the redactions relate to information provided to VETS by Yellowstone County or its agents and Yellowstone County therefore has the means to discover the redacted information.

Only relevant evidence is admissible. [Fed. R. Evid. 402](#). Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. [Fed. R. Evid. 401\(a-b\)](#). Relevant evidence may be excluded if its probative value is substantially outweighed by, among other things, unfair prejudice. [Fed. R. Evid. 403](#). The [Rule 403](#) balancing inquiry is made on a case-by-case determination, requiring an examination of the surrounding facts, circumstances, and issues. [United States v. Lloyd, 807 F.3d 1128, 1152 \(9th Cir. 2015\)](#). A district court's [Rule 403](#) determination is subject to great deference. [Lloyd, 807 F.3d at 1152](#).

Investigative reports or letters are often admitted in employment lawsuits because they are both relevant and highly **[*4]** probative. [Plummer v. Western Intern. Hotels Co., Inc., 656 F.2d 502, 505 \(9th Cir. 1981\)](#). Other district courts have admitted VETS reports exactly the same as the one at issue here. [Quinn v. Everett Safe & Lock, Inc., 53 F.Supp.3d 1335, 1339 \(W.D. Wash. 2014\)](#); [Ruiz v. Fernandez, 949 F.Supp.2d 1055, 1063 \(E.D. Wash. 2013\)](#). But the Ninth Circuit has warned against admitting investigative reports that make a conclusive finding of liability. [Amantea-Cabrera v. Potter, 279 F.3d 746, 749 \(9th Cir. 2002\)](#). A report that makes only a preliminary determination that the employer might be liable is usually not unduly prejudicial because it does not suggest to the jury that the agency has already determined the issue of liability. [Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1500 \(9th Cir. 1986\)](#). On the other hand, a report that represents a conclusive determination of liability presents a much greater risk of prejudice because the

jury may find it difficult to independently evaluate the claim in light of the agency's liability determination. [Gilchrist, 803 F.2d at 1500](#); see also [Amantea-Cabrera, 279 F.3d at 749](#).

Here, similar to other district courts and employment law cases, the Court holds the VETS report is both relevant and highly probative of Chenoweth's claim because it contains useful factual findings that tend to corroborate or conflict with one or both of the parties' timelines and version of events. However, the VETS report also contains conclusive determinations of liability that present a serious risk of prejudicing the jury. The VETS report states "Those facts conclusively reveal that Mr. Chenoweth's military service was a motivating factor when he was terminated on May 1, 2015" and "The facts clearly show that Mr. Chenoweth's military service was a motivating factor when he was terminated from the Yellowstone County Sheriff's Office on May 1, 2015." (Doc. 42-4 at 5 and 13). Under [Gilchrist](#), the Court holds the proper remedy is to admit the VETS report under the condition the two determinations of liability are redacted. Further, although not raised by either party, the Court holds the portion titled "Evaluation of Damages" must be redacted because it is outdated and may confuse the jury and the portion titled "Settlement Posture" must be redacted because it violates [Rule 408](#)'s exclusion of settlement evidence. The portion of the report that states "Litigation is recommended," does not need to be redacted because it is only a preliminary determination that Yellowstone County may be liable.

Yellowstone County also requests the VETS report be excluded under [Rule 106](#) because it contains redactions and is therefore incomplete. If the Court declines Yellowstone County's request, Yellowstone County asks in the alternative that it be allowed to introduce the Department of Justice's letter declining to represent Chenoweth. The Court declines to exclude the VETS report under [Rule 106](#) but will allow the introduction of the Department of Justice's letter.

Yellowstone County obtained the VETS report through a [Freedom of Information Act](#) request to the Department of Labor. According to the Department of Labor, the redacted portions concern information protected by [5 U.S.C. § 552](#), such as personal private information or information which discloses confidential sources. (Doc. 42-4 at 1). The Department of Labor informed Yellowstone County it may appeal the redactions, which apparently Yellowstone County did not do. (Doc. 42-4 at 2).

"If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part-or any writing or recorded statement-that in fairness ought to be **considered at the same time.**" [Fed. R. Evid. 106](#). [Rule 106](#) does not prohibit admission of an incomplete document. Instead, it allows the party against whom the document is introduced to place the remainder in evidence without additional evidentiary foundation. [United States v. Phillips, 543 F.3d 1197, 1203 \(10th Cir. 2008\)](#) (citing [Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171, 109 S. Ct. 439, 102 L. Ed. 2d 445 \(1988\)](#)).

The Court declines to exclude the VETS report under [Rule 106](#) because Yellowstone County failed to appeal the Department of Labor's redactions and therefore does not possess a "remainder" to introduce into evidence. Further, the Court is unconvinced fairness requires the introduction of the redacted portions. Of the six redactions complained of, four of them concern Yellowstone County's own agents, one concerns a Billings police officer, and one concerns an unknown person. Yellowstone County could figure out most of the redacted information by speaking with its agents. The information also appears largely inconsequential given there is only a single redacted sentence in the section titled "Evaluation of the Alleged USERRA Violation," which contains the report's main factual conclusions relevant to the alleged USERRA violation. (Doc. 42-4 at 14). The Court declines to exclude the report under [Rule 106](#), but grants Yellowstone County's alternative request to introduce the Department of Justice's letter because it is fair given the Court's ruling on the VETS letter, which contains a recommendation of litigation.

B. Evidence of whether Chenoweth should be reinstated or awarded front pay

Yellowstone County argues whether Chenoweth should be reinstated or awarded front pay is an issue solely for the Court to decide if the jury finds liability. Chenoweth argues the jury is entitled to hear evidence on those issues because the statutes and caselaw provide for reinstatement or front pay as remedies.

Front pay, although a monetary award, is a form of equitable relief that is determined by the court rather than the jury. [Carpenter v. Tyler Indep. School Dist.](#), 429 F.Supp.2d 848, 852 (E.D. Tex. 2006) (citing [Loeb v. Textron, Inc.](#), 600 F.2d 1003, 1022 n. 33 (1st Cir. 1979) and [Taylor v. Home Ins. Co.](#), 777 F.2d 849, 859-860 (4th Cir. 1985)). Front pay or other equitable relief is appropriate only if the Court concludes reinstatement is impractical. [Carpenter](#), 429 F.Supp.2d at 852 (citing [Julian v. City of Houston](#), 314 F.3d 721, 728 (5th Cir. 2002)).

The Court agrees with Yellowstone County. Reinstatement and front pay are issues determined solely by the Court and evidence directed to either is irrelevant to the jury's determination. However, the Court recognizes there is some potential for overlapping evidence which is perhaps relevant to both reinstatement and liability. The Court therefore grants Yellowstone County's motion in limine on reinstatement and front pay but may admit overlapping evidence that is otherwise relevant and probative to the jury's determination.

IV. Conclusion and order

Yellowstone County's motion in limine is granted in part and denied in part. The VETS report is admissible so long as Chenoweth makes the following redactions: the two conclusive liability determinations, the "Evaluation of Damages" portion, and the

"Settlement Posture" portion. Yellowstone County may introduce the Department of Justice's letter. Evidence of reinstatement and front pay is excluded except for overlapping evidence that is relevant and probative to the jury's determination.

You will note that Judge Watters held that the DOJ letter must be admitted if the DOL-VETS report is admitted. It is hard to say what inferences, if any, the jury might draw in your case from reading the DOJ form letter. It would be wrong and unfair for the jury to conclude, from the fact that DOJ declined your request for representation, that DOJ disagrees with DOL-VETS about the facts and the law.

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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 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 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:

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