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You Are Entitled to Reinstatement to the Job you Left and Would Have Retained even if that Means that Another Employee Must Be Displaced

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Q: I am a Sergeant in the Army National Guard and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “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 1800 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 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:

For the last ten years, I have worked for a fine dining restaurant, let's call it Quisling's Norwegian Seafood Restaurant, which was founded and is owned and operated by a man I will call Vidkun Quisling. I was the restaurant's principal cook from April 2010 until April 2019, when I left the job for a year of federal active duty, from 5/1/2019 until 4/30/2020. I have read and reread your Law Review 15116 (December 2015), and I was very careful to meet the five USERRA conditions for reemployment.

I left my civilian job to perform this year of active duty, and I gave Mr. Quisling prior oral and written notice. This year of active duty was voluntary, and it probably counts toward my five-year limit, but I am still well within the limit. I served honorably and was released from active duty without a disqualifying bad discharge from the Army. After I was released from active duty, I had 90 days to apply for reemployment, but I applied for reemployment the day after I returned to my hometown.

When I left my job in April 2019, the restaurant was full almost every night and Mr. Quisling was making money hand over fist. Like almost all restaurants, Quisling's was badly affected by the mandated shutdown ordered by the Governor to fight the COVID-19 pandemic. When I left, the restaurant had 49 employees, including waiters and waitresses serving customers in the restaurant. Now, the restaurant has only nine employees, including six delivery drivers. The restaurant is still open, but only for delivery and take-out. The number of customers served by delivery and take-out is a small fraction of the number who were previously served in the dining room.

When I left to go on active duty for a year, Mr. Quisling hired Mary Jones to be the principal cook, and I understand that she has been doing a fine job. I am not surprised, because I trained her well. She was the assistant cook under me. Forty of the restaurant's 49 employees have been laid off because of the greatly reduced demand, but the restaurant still has and needs a principal cook. If I had not left to go on active duty a year ago, I would still be the principal cook.

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 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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

I applied for reemployment, but Mr. Quisling told me that he will not reinstate me because the restaurant now needs only one cook and Mary Jones is doing a fine job. Am I entitled to reinstatement to my job as cook even if that means that Mary must be displaced?

A: Yes. Because you meet the five USERRA conditions for reemployment, you are entitled to reemployment “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 [uniformed] service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform.”⁴

Yes, 40 of the 49 employees of the restaurant have been laid off because of the shutdown of the dining room, necessitated by the COVID-19 emergency, but the restaurant still has and needs one principal cook, to prepare food for the take-out and delivery business. You were the principal cook when you left to go on active duty, and the principal cook now is the person who was promoted into the position because of your military-related departure. If your employment at the restaurant had not been interrupted by military service, you would still be the principal cook. You are entitled to reemployment in that position even if that means that Mary Jones must be laid off.

The pertinent section in the Department of Labor (DOL) USERRA regulation is as follows:

Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. *The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.*⁵

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that your right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit⁶ has held:

Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that “the

⁴ 38 U.S.C. 4313(a)(2)(A). There likely is no position in the restaurant, for which you are qualified, that is of like status and pay as the principal cook position.

⁵ 20 C.F.R. 1002.139(a) (emphasis supplied).

⁶ The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.⁷

The United States Court of Appeals for the Federal Circuit⁸ has held:

The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols' [Nichols was the returning veteran and plaintiff] former position was "unavailable" because it was occupied by another and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ... Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.⁹

Mr. Quisling must reinstate you as the principal cook, even if that means that Mary Jones must join the 40 restaurant employees who have been laid off.

Q: What is to keep Mr. Quisling from reinstating me as principal cook and then firing me shortly thereafter?

A: USERRA provides:

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

⁷ *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013).

⁸ The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

⁹ *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite the reader's attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln-St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.*, 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981); *Jennings v. Illinois Office of Education*, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Musciante v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

(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.¹⁰

Because your period of service lasted more than 180 days, your special protection period against discharge lasts for one year, starting on the date that you are properly reinstated to the principal cook position.

Two sections of the DOL USERRA regulation are pertinent:

Does USERRA provide the employee with protection against discharge?

Yes. If the employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause --

- (a)** For 180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,
- (b)** For one year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days.¹¹

What constitutes cause for discharge under USERRA?

The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.

- (a)** In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.
- (b)** If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.¹²

USERRA's legislative history explains the purpose and effect of this provision:

Section 4315(d) [later renumbered as 4316(c)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. Under current law [the 1940 reemployment statute that was superseded by USERRA in 1994] there is a one-year period of special protection against discharge without

¹⁰ 38 U.S.C. 4316(c).

¹¹ 20 C.F.R. 1002.247 (bold question and bold "yes" in original).

¹² 20 C.F.R. 1002.248 (bold question in original).

cause after return from active duty and six months protection after return from initial active duty for training. There is no explicit protection for employees returning from active duty for training or inactive duty training [drills] regardless of length. Under this provision, the protection would begin only upon proper and complete reinstatement. *See O'Mara v. Peterson Sand & Gravel Co.*, 498 F.2d 896, 898 (7th Cir. 1974).

The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement. As expressed in *Carter v. United States*, 407 F.2d 1238, 1244 (D.C. Cir. 1968), “cause” must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct; and (2) the employee had notice, express or fairly implied, that such conduct would be grounds for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario*, 796 F. Supp. 166, 172 (E.D. Pa. 1992).

The limitation on the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v. Louisville & Nashville R. Co.*, 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the “escalator” principle would have eliminated a person’s job or placed that person on layoff in the normal course.¹³

Your situation is an example of the need for the “special protection” provision in section 4316(c) of USERRA.

Please join or support ROA

This article is one of 2000-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.

¹³ House Committee Report, Committee on Veterans’ Affairs, April 28, 1993, H.R. Rep. 103-65, Part 1, reprinted in full in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found at pages 781-82 of the 2019 edition of the *Manual*.

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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