

Location Is an Aspect of Status

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***Russell v. Merit Systems Protection Board*, 324 Fed. Appx. 872 (Fed. Cir. 2008).**³

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 (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 2008 decision of the United States Court of Appeals for the Federal Circuit, 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 (MSPB). The citation to "Fed. Appx." (Federal Appendix) means that this case is only "unofficially" published and is of limited precedential value in later cases.

***Russell v. Equal Employment Opportunity Commission*, 2009 M.S.P.B. 26, 110 M.S.P.R. 557, 2009 MSPB LEXIS 1082 (March 9, 2009).⁴**

Ermea J. Russell is a retired Colonel in the Army Reserve and a life member of the Reserve Organization of America.⁵ She was a trial attorney for the United States Equal Employment Opportunity Commission (EEOC)⁶ and was assigned to the EEOC office in Jackson, Mississippi, her hometown. She left her EEOC to serve on active duty in the Army for two years. After she was released from active duty, she made a timely application for reemployment with the EEOC. It is undisputed that she met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁷

Because she met the five USERRA conditions, she was entitled to be reemployed “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, or a position of like seniority, *status*, and pay, the duties of which the person is qualified to

⁴ This is a 2009 decision of the MSPB, an independent quasi-judicial federal executive agency that was established by the Civil Service Reform Act of 1978. The Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted in 1994 to replace the 1940 reemployment statute, gave the MSPB additional responsibilities and jurisdiction. Under section 4324 of USERRA, 38 U.S.C. 4324, the MSPB hears and adjudicates claims that federal executive agencies, acting as employers, have violated USERRA. Final MSPB decisions, including MSPB decisions on USERRA cases, can be appealed by the individual complainant (but not the federal agency) to the United States Court of Appeals for the Federal Circuit.

⁵ 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: 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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁶ The EEOC is an independent federal agency that is responsible for enforcing Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and other federal statutes that forbid discrimination in employment.

⁷ USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). Colonel Russell left her civilian job to perform service in the uniformed services, and she gave prior oral or written notice to her civilian employer. She did not exceed the five-year cumulative limit on the duration of her periods of uniformed service, related to her employment relationship with the Federal Government. She served honorably and was released from active duty without receiving a disqualifying bad discharge from the Army. After release, she applied for reemployment within 90 days, as required by section 4312(e)(1)(D), 38 U.S.C. 4312(e)(1)(D).

perform.”⁸ The EEOC reemployed Russell, but not at the Jackson, Mississippi office that she had left. Instead, she was reemployed at the EEOC office in Birmingham, Alabama.⁹

As I have explained in detail in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA’s legislative history addresses the issue of the *status* of the returning veteran as follows:

Although not the subject of frequent court decisions, courts have construed status to include “opportunities for advancement, general working conditions, *job location*, shift assignment, and rank and responsibility. *Monday v. Adams Packing Association, Inc.*, 85 LRRM 2341, 2343 (M.D. Fla. 1973). *See Hackett v. State of Minnesota*, 120 Labor Cases (CCH) 811,050 (D. Minn. 1991). *A reinstatement offer in another city is particularly violative of like status (See Armstrong v. Cleaner Services, Inc., 79 L.R.R.M. 2921, 2923 (M.D. Tenn. 1972), as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation.*¹⁰

Colonel Russell argued, and I agree, that a trial attorney position in Birmingham is not of equal status to the same position in Jackson, her hometown. She was entitled to reemployment in the *position that she would have attained if she had been continuously employed*, or another position (for which she was qualified) that was of like seniority, *status*, and pay.

If the EEOC can show that Russell *would have been transferred to Birmingham anyway*, even if she had not been away from her job on active duty at the time, reinstating her in Birmingham would have been appropriate under USERRA. But I do not think that the EEOC made such a showing. The EEOC attorney who replaced Russell in Jackson was still working in Jackson when Russell returned from active duty. It seems clear to me that Russell would have remained in Jackson but for the interruption of her EEOC career for Army duty. Unfortunately, the MSPB did not agree.

When she was reinstated in Birmingham instead of Jackson, Colonel Russell filed a grievance with her union, contending that putting her in a job 236 miles away from her home violated the collective bargaining agreement between the union and the EEOC. Unfortunately, the grievance did not result in her being moved back to Jackson, so she filed a complaint with the MSPB, claiming that her USERRA rights had been violated. USERRA cases against state and local

⁸ 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

⁹ According to “Bing Maps,” it is 236 miles from Jackson to Birmingham and the trip takes almost four hours by automobile.

¹⁰ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 776-77 of the 2019 edition of the *Manual*.

governments and private employers are filed and adjudicated in federal district courts, but USERRA cases against federal executive agencies are filed and adjudicated in the MSPB, under section 4324 of USERRA, which provides:

(a)

(1) A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall—

(i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

(ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint

accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)

(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.¹¹

The MSPB held that it did not have jurisdiction to hear Russell's claim that her USERRA rights had been violated because she had chosen to file a grievance with her union over the same issue.¹² In so holding, the MSPB considered itself bound by a 2007 Federal Circuit decision.¹³ Russell appealed to the Federal Circuit, which reversed.¹⁴

¹¹ 38 U.S.C. 4324.

¹² *Russell v. Equal Employment Opportunity Commission*, 2007 M.S.P.B. 262, 107 M.S.P.R. 171, 2007 MSPB LEXIS 7046 (2007). I discuss this decision in Law Review 0826 (April 2008).

¹³ *Pittman v. Department of Justice*, 486 F.3d 1276 (Fed. Cir. 2007). I discuss *Pittman* in detail and criticize it in Law Review 0825 (April 2008).

¹⁴ *Russell v. Merit Systems Protection Board*, 324 Fed. Appx. 872 (Fed. Cir. 2008). Unfortunately, the Federal Circuit panel did not overrule *Pittman*, but only distinguished it.

The Federal Circuit reversed the MSPB's decision that it did not have jurisdiction, and the Federal Circuit remanded the case to the MSPB to decide the merits. On remand, the MSPB held (wrongly in my view) that Russell's USERRA rights were not violated because the EEOC had established that it *would have moved the position to Birmingham anyway, even if Russell had not been on active duty at the time.*¹⁵ Russell did not appeal to the Federal Circuit, and the time for doing so has expired. This case is over.

Russell was entitled to reemployment in the position that she would have attained, or another position of like seniority, *status*, and pay, *even if that meant that another employee must be displaced to make room for her.* 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.*¹⁶

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 the veteran's 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 Circuit¹⁷ 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 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."¹⁸

¹⁵ *Russell v. Equal Employment Opportunity Commission*, 2009 M.S.P.B. 26, 110 M.S.P.R. 557, 2009 MSPB LEXIS 1082 (March 9, 2009).

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

¹⁷ 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.

¹⁸ *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013).

The United States Court of Appeals for the Federal Circuit¹⁹ 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.²⁰

It seems to me that the MSPB gave undue deference to the EEOC's claim that it *would have moved Russell to Birmingham anyway*, even if she had not been away from her job for military service, because the MSPB did not want to require the EEOC to move another employee to make room for Colonel Russell in Jackson. The MSPB's decision was wrong, but unfortunately it is final.

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

¹⁹ 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.

²⁰ *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 in the appropriate position, 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 *Muscianese v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

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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