

LAW REVIEW¹ 21009

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Yes, You Can Double Dip

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1.1.1.7—USERRA applies to state and local governments

1.2—USERRA forbids discrimination

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3.1—Reserve retirement and civilian employment

Almeida v. Retirement Board of Rhode Island Employees Retirement System, 116 F. Supp. 2d 269 (D.R.I. 2000).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 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 44 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 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³ This is a 2000 decision of the United States District Court for the District of Rhode Island. The State of Rhode Island did not appeal this decision (favorable to the Reserve Component members who were State employees) to the United States Court of Appeals for the First Circuit, the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. This decision became final long ago. I did a computer search and did not find any later published court decision that has cited this important decision. In six early "Law Review" articles, Law Reviews 2 (March 1998), 13 (June 2000), 15 (August 2000), 16 (September 2000), 21 (December 2000), and 57 (November 2002), I addressed the conflict between

A group of Rhode Island state and local government employees brought this lawsuit in the late 1990s, challenging the application of Rhode Island law to their situations. At the time, and still today, Rhode Island law provided as follows:

Any active member of the retirement system, who served on active duty in the armed services of the United States or in the Merchant Marine service of the United States as defined in P.L. 1946, chapter 1721, section 2 may purchase credit for that service up to a maximum of four (4) years provided that he or she received an honorable discharge. Provided further that any employee on an official leave of absence for illness or injury shall be eligible to purchase military credits as defined herein while on the leave of absence.⁴

These individuals sought to purchase credit for active duty periods that they had served *before they began their careers as state or local government employees*. The State of Rhode Island refused to permit them to purchase the retirement credit based on another section of Rhode Island law.⁵

As I have explained in detail in Law Review 16086 (September 2016), a person who serves in the Reserve or National Guard and who accumulates at least 20 “good years” for Reserve Component retirement purposes qualifies to receive Reserve Component retirement starting at age 60. As I explained in Law Review 16090 (September 2016), a Reserve Component member who performs “contingency service” as a Reserve Component member after January 28, 2008 can qualify to start receiving the Reserve Component retired pay before his or her 60th birthday.

Under Rhode Island law and policy in effect at the time, a new state or local government employee was permitted to purchase state-local government retirement credit for up to four years of active military duty performed prior to the start of his or her civilian career *only if* the veteran had chosen not to affiliate with the Reserve or National Guard after leaving active duty. This “no double dipping” provision of Rhode Island law conflicted directly with section 12736 of title 10 of the United States Code. That section provides:

section 12736 of title 10 of the United States Code and state laws that preclude state and local government employees from purchasing state or local government retirement credit for periods of pre-employment military service if they are using the same active duty periods for Reserve Retirement credit under federal law. I am addressing the issue anew now because 18 years have passed since I last addressed this topic and because I have heard from a service member in Rhode Island who is faced with this issue today.

⁴ Rhode Island General Laws section 36-9-31(a).

⁵ Rhode Island General Laws section 36-10-9(5), which, at the time, provided that a state or local government employee was not permitted to purchase credit for pre-employment active duty if the employee was using the same active duty period to qualify for or to determine the amount of pension benefits *under any other law*, including the federal law that provides for retirement benefits at age 60 for persons who accumulated at least 20 “good years” in the National Guard or Reserve, including credit for active duty.

No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this chapter may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, *under any other law*, on account of civilian employment by the United States *or otherwise*, or in determining the amount payable under that law, if that service is otherwise properly credited under it.⁶

In 1948, Congress enacted legislation⁷ providing for the retirement system for Reserve and National Guard members. The purpose was to encourage some of the 16 million young men and women who had served on active duty during World War II to sign up for the National Guard or Reserve and to remain for 20 years or more. Congress correctly anticipated that those experienced veterans might be needed again to defend our country. Just two years later, in June 1950, North Korea invaded South Korea and the Korean War began. Many of the American service members who successfully fought the North Korean and Communist Chinese invaders were Reserve and National Guard personnel recalled to active duty for this new emergency.

Section 12736 has been part of the title 10 chapter dealing with Reserve Component retired pay since 1948, although the number has changed as the title 10 numbering system was reorganized. The point of offering Reserve Component retirement benefits is to encourage qualified young men and women to serve in the Reserve Components for 20 years or more. Section 12736 means that no state is permitted to undo this valuable incentive by denying state or local government retirement on the basis that the person is also receiving Reserve Component retirement credit for the same active duty period.

The Supremacy Clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁸

⁶ 10 U.S.C. 12736 (emphasis supplied).

⁷ At ROA headquarters, in the treasured Minuteman Memorial Building, we have the pen that President Harry S. Truman (one of the founders of ROA in 1922) used to sign this vital legislation.

⁸ United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

The Supreme Court has held that a federal statute overrides a conflicting state statute.⁹ State and local government officials sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

In *Almeida*, the United States District Court for the District of Rhode Island not surprisingly struck down Rhode Island's "no double dipping" rule as applied to a state or local government employee receiving Reserve Component retirement credit for periods of active duty. The court relied on a precedent from the 9th Circuit¹⁰ striking down a similar California law.

Q: How does section 12736 of title 10 relate to the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services, as defined by USERRA, and who meets the five simple USERRA conditions,¹¹ is entitled to reemployment in the civilian job after release from the period of service. Under section 4318 of USERRA,¹² a person who meets the five conditions and is reemployed is entitled to civilian pension credit for the military service time. Most of the plaintiffs in *Almeida* were seeking to purchase civilian retirement credit for military active duty periods that they performed *before* they began their relevant civilian careers. Thus, USERRA did not apply directly to their situations.

One can certainly argue that denying a person the right to purchase state-local retirement credit for active duty performed before the start of the relevant civilian career on the basis of the person having chosen to affiliate with the National Guard or Reserve after leaving active duty violates section 4311 of USERRA. That section provides:

⁹ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁰ *Cantwell v. County of San Mateo*, 631 F.2d 631 (9th Cir. 1980). The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, the Commonwealth of the Northern Marianas Islands, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

¹¹ The person must have left the civilian job to perform uniformed service and must have given the employer prior notice. The person's cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. Under section 4312(c) of USERRA, 38 U.S.C. 4312(c), there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count toward the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military, like a bad conduct discharge or an OTH (other than honorable) discharge. After release from the period of service, the person must have made a timely application for reemployment. After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

¹² 38 U.S.C. 4318.

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.¹³

It is not necessary to argue that the Rhode Island policy violates section 4311 of USERRA because section 12736 of title 10 is explicit.

Q: What is the relationship between USERRA and other federal laws, state laws, local ordinances, collective bargaining agreements, etc.?

A: Under section 4302 of USERRA, this federal law is a floor and not a ceiling on the rights of service members and veterans. State laws and union agreements can give the service member

¹³ 38 U.S.C. 4311.

or veteran *greater or additional rights*, but they cannot limit the rights that Congress conferred when it enacted USERRA. Section 4302 provides:

- (a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)** This chapter *supersedes any State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.¹⁴

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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. 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, 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

¹⁴ 38 U.S.C. 4302 (emphasis supplied).

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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