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Important New Case on the Furlough or Leave of Absence Clause

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
About Sam Wright

1.1.3.1—USERRA applies to voluntary service
1.3.2.10—Furlough or leave of absence clause
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***White v. United Airlines, Inc.,* 416 F. Supp. 3d 736 (N.D. Ill. 2019).[3]**

***White v. United Airlines, Inc.,* 2021 U.S. App. LEXIS 2973, 2021 WL 364210 (7th Cir. Feb. 3, 2021).[4]**

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[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 decision by Judge Charles R. Norgle of the United States District Court for the Northern District of Illinois. The citation means that you can find the decision in Volume 416 of *Federal Supplement, Third Series,* and the decision starts on page 736.

[4] This is the decision of the three-judge panel of the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The

Eric White's lawsuit

Eric White is a Lieutenant Colonel in the Air Force Reserve and a member of the Reserve Organization of America (ROA).[5] On the civilian side, he is a pilot for United Airlines (UAL). He is represented by attorneys Robert Joseph Barton, Matthew Zachary Crotty, Peter Romer-Friedman, and Thomas Gregory Jarrard.[6] White brought the suit on behalf of himself and "all others similarly situated"—that is he asked the court to make the case a class action.[7] He claims that UAL violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the rights of all other UAL pilots who serve in the Reserve or National Guard, by denying them their UAL pay when they are away from their civilian jobs for short tours of military duty.

USERRA's pertinent provision

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, more than 26 years ago. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the

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appellate court panel reversed the dismissal of Colonel White's lawsuit and remanded the case to the United States District Court for the Northern District of Illinois, for trial.

[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 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] Like the plaintiff (White), Crotty and Jarrard are reserve officers (of the Army National Guard and the Marine Corps Reserve, respectively) and are members of ROA.

[7] A class action lawsuit is an efficient and effective way to vindicate the rights of many persons whose rights have been violated by the same defendant in essentially the same way. Courts generally approve motions for class action treatment if the case meets the standards of numerosity, commonality, and representativeness. That is, there must be so many potential plaintiffs that it makes sense to resolve the matter in a single lawsuit instead of requiring each person to bring his or her own lawsuit—numerosity. Commonality means that all the potential plaintiffs have essentially the same claim. Representativeness means that the interests of the named plaintiff (the one person who had the courage to bring the lawsuit) are representative of the interests of the class. In this case, Judge Norgle did not act on the plaintiff's motion for class action treatment, because Judge Norgle dismissed the case before trial. White has appealed. If the appellate court reverses the dismisses the dismissal, as I believe likely, the case will be heard on remand and the motion for class action treatment will likely be granted. In footnote 1 of her decision for the 7th Circuit panel, Judge Wood wrote: "Federal Rule of Civil Procedure 23(c)(1)(A) requires the district court to decide whether to certify a proposed class 'at an early practicable time.' It does not condition certification on a winning case by the prospective class representative; indeed, such a rule would amount to one-way intervention, which the Rule was designed to end. Whether a class is proper is a threshold issue that is distinct from the ultimate merit of a claim."

law that led to the drafting of millions of young men (including my late father) for World War II.[8] The pertinent clause of USERRA is as follows:

> **(1)** Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
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> **(A)** deemed to be on furlough or leave of absence while performing such service; and
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> **(B)** entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.[9]

Like much of USERRA, the furlough or leave of absence clause was carried over from the comparable provision of the VRRA. The prior law provided that a person away from work for military service "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such [military] forces."[10]

USERRA's legislative history addresses the purpose and effect of the furlough or leave of absence clause as follows:

> New section 4316(b)(1) would provide that, subject to new paragraphs (2) through (6) discussed below, an individual who serves in the uniformed services will be considered to be on furlough or leave of absence while in the service. That person will be entitled to the same rights and benefits not determined by seniority that are generally provided to the employer's other employees with similar seniority, status, and pay who are on furlough or leave of absence. The rights and benefits to which the person is entitled will be those under a practice, policy, agreement, or plan in force at the beginning of the period of uniformed service or which becomes effective during the period of service.
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> Current section 4301(b)(1), which is similar to new section 4316(b)(1), provides that an individual restored to or employed in a position under chapter 43 [the reemployment statute] is considered as having been on furlough or leave of absence during the individual's period of training and service and that the individual is entitled to participate in benefits

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[8] Although the VRRA was part of the draft law from 1940 until 1974, it has applied to voluntary enlistees as well as draftees since 1941,

[9] 38 U.S.C. 4316(b)(1). This provision is referred to as the "furlough or leave of absence clause." It means that an employee who is away from his or her civilian job for uniformed service must be given the same benefits, during the absence from work for service, that other employees of the same employer receive while on non-military leaves of absence of comparable duration.

[10] 38 U.S.C. 4301(b)(1) (1988 version of the United States Code).

> offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time the individual was inducted into the Armed Forces.
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> The Committee [Senate Committee on Veterans' Affairs] bill would codify court decisions that have interpreted current law [the VRRA] as providing a statutorily-mandated leave of absence for military service that entitles servicemembers to participate in benefits that are accorded other employees. *See Waltermeyer v. Aluminum Company of America,* 804 F.2d 821 (3rd Cir. 1986); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1519 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985). The new provision would expand upon the current protection by clarifying that the returning employee would be entitled not only to the rights and benefits of agreements and practices in force at the time he or she left the employment, but also to rights and benefits of agreements and practices which become effective during the period of service.
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> Current section 4301(b)(1) also provides that an individual who is reemployed under chapter 43 must be considered as having been on furlough or leave of absence and is entitled to participate in insurance offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer when the individual was inducted into the Armed Forces.
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> The Committee bill would preserve the servicemember's right to retention of existing insurance if that same right would generally be extended to employees during a period of furlough or leave of absence.[11]

On the House side, the legislative history of USERRA makes clear that court decisions under the VRRA remain in effect under USERRA unless the law changed in a pertinent way in 1994:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with this Act [USERRA], remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[12]

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[11] 1993 Senate Committee Report, October 18, 1993 (S. Rep. 103-158, 1993 WL 432576 (Leg. History), reprinted in Appendix D-2 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found at pages 864-65 of the 2019 edition of the *Manual.*

[12] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual.* The quoted paragraph can be found at pages 759-60 of the 2019 edition of the *Manual.*

Cases like *Waltermeyer* and *Winders,* construing the furlough or leave of absence clause of the VRRA, should be cited and relied upon in construing the similar clause in USERRA.

How this provision applies to Eric White and other UAL pilots who serve in the Reserve or National Guard

Like several hundred other UAL pilots who are actively participating in the National Guard or Reserve during their UAL employment, Lieutenant Colonel Eric White is frequently away from his UAL job for short-term military leave periods, for inactive duty training (drills) and for annual training periods typically lasting two or three weeks. Under the collective bargaining agreement (CBA) between UAL and the Air Line Pilots Association (ALPA),[13] the union that represents UAL pilots, UAL pilots who are away from work for short periods of illness (sick leave) or for jury duty (jury leave) receive their regular UAL pay while away from work for these short sick leave and jury leave periods. But UAL pilots who are away from their jobs for short military duty periods, like drill weekends and annual training tours, do not receive UAL pay while away from work for comparable periods of absence. White argues, I believe correctly, that USERRA's furlough or leave of absence clause[14] makes it unlawful for UAL to deny pay to the pilots for short periods of military leave.

The UAL-ALPA CBA also provides for a profit-sharing plan. At the end of the year, UAL pilots receive a share of the airline's profits. The share is computed based on a formula. One element of the formula is the individual pilot's UAL compensation during the year. Thus, pilots like White, who are periodically away from their civilian jobs for drill weekends and annual training periods in the Reserve or National Guard, are doubly punished by the airline. They lose out on the money they would have received from their airline but for their short military training periods, and they lose again in the profit-sharing plan.

USERRA's definition of "benefit of employment"

Section 4303 of USERRA defines 16 terms used in this law. The term "benefit of employment" is defined as follows:

> The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (*including wages or salary for work performed*) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock

[13] In its first case construing the VRRA, the Supreme Court held: "No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Section 4302(b) of USERRA, 38 U.S.C. 4302(b), codifies the principle that the CBA cannot deprive the service member of statutory rights under the reemployment statute.

[14] 38 U.S.C. 4316(b)(1).

ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.[15]

As enacted in 1994, and until amended in 2010, USERRA's definition of "benefit of employment" did not say "including salary or wages for work performed." Rather, the definition included "*other than* salary or wages for work performed."[16] The sparse but instructive language of the 2010 legislative history is as follows:

> Under current law [USERRA, as it existed in 2010], section 4311(a) of title 38, U.S.C., employers may not deny any "benefit of employment" to employees or applicants on the basis of membership in the uniformed services, application for service, performance of service, or service obligation. However, the U.S. Court of Appeals for the Eighth Circuit held in 2002 USERRA does not prohibit wage discrimination because "wages or salary for work performed" are specifically excluded from the law's definition of "benefit of employment." *Gagnon v. Sprint Corp.,* 284 F.3d 839, 853 (8th Cir. 2002).
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> **Senate Bill**
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> Section 403 of H.R. 1037, as amended, would amend section 4303(2) of title 38, U.S.C., to make it clear that wage discrimination is not permitted under USERRA.
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> **House Bill**
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> The House Bills contain no comparable provision.
>
> **Compromise Agreement**
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> Section 701 of the Compromise Agreement follows the Senate Bill.[17]

In his opinion, Judge Norgle did not mention, cite, discuss, or consider the 2010 amendment and its legislative history, probably because he was unaware of them. I contend that the 2010 amendment is pertinent and directly contradicts Judge Norgle's central holding.

UAL files a motion to dismiss, which the judge granted.

Shortly after White filed his lawsuit, UAL filed a motion to dismiss the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). A judge should grant a Rule 12(b)(6) motion only if he

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[15] 38 U.S.C. 4303(2) (emphasis supplied).

[16] The amendment was made by section 701(a) of Public Law 111-275, the Veterans' Benefits Act of 2010, 124 Stat. 2864 (October 13, 2010).

[17] 2010 Amendments: Joint Explanatory Statement, September 28, 2010, 156 Cong. Rec. S7656-02, 2010 WL 3767475, reprinted in Appendix E-5 of *The USERRA Manual.* The quoted paragraphs can be found at pages 956-57 of the 2019 edition of the *Manual.*

or she can say that there is no relief that the court can award *even if all the facts are exactly as alleged by the plaintiff in the complaint.* Judge Norgle held that, under his understanding of the law, the defendant airline should win even if all the facts are as alleged by White.

In his opinion, Judge Norgle rejected the argument that short tours of military training, like drill weekends and traditional annual training tours, are comparable to jury service and that USERRA's furlough or leave of absence clause[18] requires UAL to pay pilots their regular UAL compensation when they are away from work for these short military tours if it pays pilots who are away from work for jury duty. Judge Norgle held:

> To that end, and with the above in mind, the Court agrees with Defendants' textual analysis. It is contrary to the express language of the statute to hold that a business is required to pay a reservist wages for time not worked. Moreover, the Court disagrees with the contention that jury duty is comparable in nature—in the way that Congress intended—to reservist duties. Although both may be sporadic and uncontrollable in timing, all citizens (including those in reserve military roles) are subject to jury duty simply by nature of living in America, whereas military duties—which no doubt are honorable and likewise essential to our society—are *voluntarily joined* (in present times).[19]

USERRA applies to voluntary as well as involuntary service.

Like too many others, Judge Norgle wrongly conflates the reemployment statute with the draft.[20] In fact, like the VRRA,[21] USERRA applies equally to *voluntary as well as involuntary service.* USERRA's definition of "service in the uniformed services" is as follows:

> The term "service in the uniformed services" means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose

[18] 38 U.S.C. 4316(b)(1).
[19] *White,* 416 F. Supp. 3d at 739-40 (emphasis supplied).
[20] In 1955, when he was 18, Charles Norgle was drafted. Like millions of other young men of that generation, including Elvis Presley, he served on active duty for two years and was honorably discharged. It is perhaps not surprising that when he thinks of military service and reemployment Judge Norgle thinks of the two-year involuntary active duty tour that he completed 63 years ago.
[21] *See* 38 U.S.C. 4324(a) (1988 version of the United States Code).

> of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.[22]

Of course, in today's era, all military service is essentially voluntary. No one has been drafted by our country since 1973, when Congress abolished the draft and established the All-Volunteer Military (AVM), and when Judge Norgle was 36.

Effective enforcement of USERRA is essential.

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20th Century) and by drafting young men into military service.[23] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[24]

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). No one is required to serve in our country's military, but someone must defend this country. When I hear employers complain about the "burdens" imposed by laws like USERRA, I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, USERRA imposes burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform.

As we approach the 19th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over

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[22] 38 U.S.C. 4303(13) (emphasis supplied).

[23] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

[24] *Arver v. United States,* 245 U.S. 366 (1918). The citation means that you can find this decision in Volume 245 of *United States Reports,* starting on page 366.

> 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 19 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 47 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor. Our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that we never need to return to the draft. Maintaining the AVM requires that we provide incentives and minimize disincentives to serve among the young men and women who are qualified for military service.

I have written:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
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> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs

> or certain prescription medicines (including medicine for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).
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> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is a compelling government interest in the enforcement of USERRA.[25]

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the complaining of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren. You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

> **White appealed to the 7th Circuit and ROA supported his appeal.**

[25] Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.

Through his attorneys, Lieutenant Colonel White appealed Judge Norgle's erroneous decision to the 7th Circuit.[26] ROA prepared and filed a friend of the court brief in support of White's appeal. You can find a copy of that brief at the end of this article.[27]

The 7th Circuit agreed with White and ROA.

As is always the case in our federal appellate courts, the *White* case was assigned to a panel of three judges. In this case, the panel consisted of Judge Diane P. Wood, Judge Michael Y. Scudder, and Judge Michael B. Brennan, all sitting 7th Circuit judges. Judge Wood wrote the scholarly opinion, and Judge Scudder and Judge Brennan joined in a unanimous panel decision.

Judge Wood opened her opinion with the following paragraph:

> In 1994, Congress passed the Uniformed Services Employee and Reemployment Rights Act (USERRA) with the goal of prohibiting civilian employers from discriminating against employees because of their military service. 38 U.S.C. § 4301(a). At issue in this case is a matter of first impression in the courts of appeals: whether USERRA's mandate that military leave be accorded the same "rights and benefits" as comparable, nonmilitary leave requires an employer to provide paid military leave to the same extent that it provides paid leave for other absences, such as jury duty and sick leave. The district court answered that question in the negative and dismissed the suit. We read the statute differently. We find that paid leave falls within the set of "rights and benefits" defined by the statute, and so we reverse and remand for further proceedings.[28]

In her opinion, Judge Wood firmly rejected Judge Norgle's holding that short military training periods like drill weekends and traditional annual training tours are not "comparable" to jury duty because jury duty is mandatory and military duty is voluntary:

> The district court cut off this analysis too soon. It rested its holding on the observation that, "[a]lthough both may be sporadic and uncontrollable in timing, all citizens ... are subject to jury duty ... whereas military duties ... are voluntarily joined." This logic both ignores the text of the regulation and impermissibly penalizes servicemembers for joining the military, in direct contravention of USERRA's core purpose. Comparability analysis is not affected by the fact that the service-member has voluntarily signed up for military service (and thus will be eligible for military leave at some point). For almost 50 years now, the United States has had an all-volunteer force. Instead, what matters is an employee's control over the *timing* of her

[26] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[27] The United States Chamber of Commerce and the Air Transport Association (trade association for major airlines) filed amicus briefs urging the 7th Circuit to affirm the District Court's dismissal of Colonel White's lawsuit. The ROA brief was the only amicus brief urging the court to reverse the dismissal.

[28] White v. United Airlines, Inc., No. 19-2546, 2021 U.S. App. LEXIS 2973, at *2-3 (7th Cir. Feb. 3, 2021).

> leave of absence—*i.e.*, whether she has the option to choose *when* to take a given stretch of leave.[29]
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> The appellate court has accepted White's argument and ROA's argument that short military training tours are comparable to leave for jury duty. If an employer grants to employees *paid* leave for jury duty, it must similarly grant paid leave for comparable periods of military training. It is likely that on remand White will prevail, for himself and the class of UAL pilots who are active participants in the Reserve Components. We will keep the readers informed of developments in this vitally important case.

ROA filed an Amicus brief regarding White v. United Airlines

UPDATE—October 2021

This case decision is now officially published. The citation is *White v. United Air Lines, Inc.,* 987 F.3d 616 (7th Cir. 2021).

United Air Lines (UAL) filed a petition for rehearing and rehearing *en banc* in the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from federal district courts in Illinois, Indiana, and Wisconsin. The 7th Circuit denied that petition, as follows:

> Defendants-appellees filed a petition for rehearing and rehearing *en banc* on February 17, 2021. No judge in regular active service [on the 7th Circuit] has requested a vote on the petition for rehearing *en banc,* and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore DENIED.

White v. United Air Lines, Inc., 2021 U.S. App. LEXIS 7038 (7th Cir. March 10, 2021).

UAL's final available appellate step was to petition the Supreme Court for *certiorari* (discretionary review). UAL has not filed a petition in the Supreme Court, and the deadline for doing so has passed. This 7th Circuit decision is final.

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[29] White v. United Airlines, Inc., No. 19-2546, 2021 U.S. App. LEXIS 2973, at *18-19 (7th Cir. Feb. 3, 2021) (emphasis by italics in original).

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