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The Individual Federal Employee or Service Member Is Exempt from Suit if within the Scope of Employment

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

[About Sam Wright](#)

9.0—Miscellaneous

Q: I am a personal injury lawyer in a city that is near a major military installation. I have a client who was stopped for a red light and another vehicle ran into her from behind, causing her serious injuries. The other driver was a soldier on active duty in the United States Army. It is unclear whether the soldier was within the scope of his Army duties. Does my client have a cause of action against the United States? Or the individual soldier? Or maybe both?

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 45 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.

A: If the driver of the other vehicle was on active duty and was in the scope of his employment, the only cause of action is against the United States. The pertinent provision in the Federal Tort Claims Act (FTCA) is as follows:

The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government [including a service member] while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter is precluded without regard to when the act or omission occurred.³

The general rule under the FTCA is as follows:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual, under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.⁴

Q: What do I need to do to perfect my client's FTCA claim?

A: The pertinent FTCA section is as follows:

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be

³ 28 U.S.C. 2679(b)(1). *See generally* Law Review 16071 (July 2016).

⁴ 28 U.S.C. 2674. The determination of whether a private individual (including a corporation) would be liable under like circumstances is based on the law of the state or jurisdiction where the allegedly wrongful act occurred.

asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.⁵

This means that, before you file suit, you must first file an administrative claim with the Federal department or agency that employed the alleged tortfeasor. If the other driver was a soldier in the United States Army, you must file your administrative claim with the Department of the Army.

Q: How long do I have to file the administrative claim with the Department of the Army?

A: You must file the administrative claim within two years after the cause of action accrues. When the Federal agency or department denies your administrative claim and notifies you by certified mail, you have six months to file suit in the appropriate Federal district court.⁶

Q: I do not know whether the soldier was in the scope of his duties at the time of the accident. How do you suggest that I proceed?

A: I suggest that you file an administrative claim with the Department of the Army, to get the claim in on time. If the soldier was not in scope, the Army will probably tell you that and deny your claim on that basis. Then, you can sue the soldier.

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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

⁵ 28 U.S.C. 2675(a).

⁶ <https://nationaltriallaw.com/statute-limitations-federal-tort-claim/#:~:text=The%20FTCA%20has%20a%202-year%20statute%20of%20limitations%2C,2%20years%20of%20an%20injury%20resulting%20from%20negligence.>

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 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002