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Neither the Fact that the Assignment Is OCONUS, Nor the "Temporary" Nature of the Assignment, Nor the Fact that the Contract Number Has Changed, Nor the Fact that the Job Has Been Filled Defeats your USERRA Rights.

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

1.1.1.5—USERRA applies to employers outside the United States
1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees
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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.

Q: I am a Lieutenant Colonel in the Army Reserve[3] and a life member of the Reserve Organization of America (ROA).[4] I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I work for a large American engineering firm with worldwide operations. I shall call the firm Engineers R Us or ERU.

I was hired by ERU in the summer of 2017. After some company training and a couple of short-term assignments, the company sent me to Korea in the fall of 2017 to work in an ERU team of ten engineers doing various tasks for a major United States military command. This team of ten was one ERU project under a worldwide contract with the Department of Defense (DOD).

In 2018, I was offered the opportunity to return to active duty for two years, from 10/1/2018 until 9/30/2020. I have read and reread your Law Review 15116 (December 2015) about the five conditions that a person must meet to have the right to reemployment under USERRA, and I was very careful to meet those conditions and to document that I met them. I left my job in September 2018 to go on active duty, and I gave prior oral and written notice to my ERU supervisor and the ERU personnel office.

When I gave ERU notice that I would be leaving my job to return to active duty, the company hired a new employee, Mary Jones, and sent her to Korea to fill my place. I am informed that she has been a great addition to the team.

I served on active duty for two years. I served honorably and was released from active duty on schedule on 9/30/2020. I was not discharged from the Army Reserve. I simply returned to the status of a part-time Army Reserve soldier.

ERU's worldwide contract with DOD expired on 9/23/2020, just before I was released from active duty a week later. DOD and ERU entered a new contract with a start date of 9/24/2020, for engineering services for this one command.

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[3] The set-up for this article is based on a real situation, but many of the factual elements are fictitious.

[4] 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.

In early September 2020, I made a formal application for reemployment with ERU in anticipation of my release from active duty at the end of that month. Of the ten ERU employees working on the project at the command headquarters, nine (including Mary Jones) were hired for the new contract and work continued almost seamlessly. One ERU employee (a man in his sixties) chose to retire and went home to the United States in late September.

The company denied my application for reemployment, and the ERU General Counsel sent me a long letter making four legal assertions:

a. **USERRA does not apply because the job is outside the U.S.**
b. **USERRA does not apply because my job is "temporary."**
c. **USERRA does not apply because the job I had, under the worldwide contract with DOD, no longer exists. The nine ERU employees who were working in Korea under the old contract applied for ERU jobs under the new contract and were hired.**
d. **USERRA does not require ERU to reemploy me because doing so would impose an "undue hardship" on the company. My job was filled by Mary Jones when I left to return to active duty, and Mary is doing a fine job. USERRA does not require an employer to discharge a satisfactory employee to make room for a returning veteran.**

What do you say about the General Counsel's assertions?

A: Those four assertions are directly contradicted by the text and legislative history of USERRA, by the Department of Labor (DOL) USERRA regulations, and by the case law under USERRA and the predecessor reemployment statute. I will discuss each assertion separately.

USERRA applies all over the world to American companies and to foreign companies that are controlled by American companies.

Section 4319 of USERRA provides:

> **(a) Liability of controlling United States employer of foreign entity.** If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.
>
> **(b) Inapplicability to foreign employer.** This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by an United States employer.
>
> **(c) Determination of controlling employer.** For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the

> interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.
>
> **(d) Exemption.** Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of sections 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.[5]

The 1998 legislative history of the USERRA amendment that added section 4319 is as follows:

> Section 2 of the bill would revise the definition of "employee" presently found in section 4303(3) of title 38, United States Code, to clarify that it includes persons employed in a foreign country by an employer that is incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States. It would also add a new section 4319 to chapter 43 to clarify the liability of the controlling U.S. employer for violations of the law, to set out when an employer shall be considered to be covered by the law, and to exempt employers when compliance would cause the employer to violate the law of the foreign country in which the workplace is located.[6]

You need not prove that your pre-service job was "other than temporary" to have the right to reemployment under USERRA.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), among other articles, Congress enacted USERRA and President Bill Clinton signed it on 10/13/1994. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

Under the VRRA, it was necessary for the returning veteran to establish, as an eligibility criterion for reemployment, that his or her pre-service civilian employer relationship was "other than temporary."[7] Under USERRA, it is no longer necessary to prove that one's pre-service employer relationship was "other than temporary." Under USERRA, "temporary" is a very

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[5] 38 U.S.C. 4319. Section 4319 was added to USERRA by a 1998 amendment. Public Law 105-368, Title II, section 212(b)(1), 112 Stat. 3331 (November 11, 1998).

[6] House Report Number 105-448, 1998 WL 117158 (Legislative History). This legislative history can be found in Appendix E-2 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 978-79 of the 2020 edition of the *Manual. See also* Law Review 18048 (June 2018).

[7] Even if the old rule were still in effect, you would qualify. Your *employer relationship* with ERU is other than temporary, although your specific job assignment to the contract in Korea may be temporary. At a firm like ERU, some employees work for a whole career based on a series of short-term job assignments.

narrow affirmative defense for which the employer bears a heavy burden of proof. Section 4312(d) of USERRA provides:

> **(1)** An employer is not required to reemploy a person under this chapter if—
>
> **(A)** the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
>
> **(B)** in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or
>
> **(C)** *the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.*
>
> **(2)** In any proceeding involving an issue of whether—
>
> **(A)** any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,
>
> **(B)** any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or
>
> **(C)** *the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,*
>
> *the employer shall have the burden of proving the* impossibility or unreasonableness, undue hardship, or *the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.*[8]

The pertinent section of the DOL USERRA regulation is as follows:

> **Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**
>
> USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that

[8] 38 U.S.C. 4312(d) (emphasis supplied).

> the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.[9]

The fact that your ERU assignment to Korea may have been temporary in no way detracts from your USERRA rights.[10]

The transition from the worldwide ERU contract with DOD to a specific contract for the major military command is irrelevant.

The General Counsel is apparently contending that the end of the worldwide ERU contract with DOD on 9/23/2020, and the substitution of a specific DOD-ERU contract for the command where you worked, mean that your pre-service ERU position was eliminated and that you therefore have no reemployment rights. That assertion is without merit.

As I explained in Law Review 19102 (November 2019), the definitive reference on USERRA is *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. In their book, they wrote:

> Elimination of an employee's preservice position does not automatically make the reemployment impossible or unreasonable. What would have happened if the employee had not been away for military service must be considered. If the employee would have been placed in another position, the changed-circumstances exception would not apply.[11]

The probative fact is that Mary Jones was brought in to replace you when you left your ERU job for military service in 2018, and she is still employed by the company on the Korea project. From that fact, it is reasonable to infer that you would still be working for ERU in that position if your ERU career had not been interrupted by military service in 2018.

You are entitled to reemployment even if that means that Mary Jones must be displaced.

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*

[9] 20 C.F.R. 1002.41 (bold question in original).
[10] Your employer relationship with ERU was not brief and nonrecurrent, although your assignment to Korea may have been.
[11] *The USERRA Manual,* 2029 edition, section 4:19, page 159.

was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.[12]

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 Circuit[13] 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.[14]

The United States Court of Appeals for the Federal Circuit[15] 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.[16]

The "undue hardship" affirmative defense does not apply to your situation.

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[12] 20 C.F.R. 1002.139(a) (emphasis supplied).

[13] 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.

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

[15] 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.

[16] *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 *Muscianese v. U.S. Steel Corp.,* 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

USERRA's "undue hardship" affirmative defense only applies "in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313."[17] Section 4313(a)(3) and section 4313(b)(2)(B) apply to the returning veteran with a disability incurred or aggravated during the period of service who needs an employer accommodation for that disability. Section 4313(a)(4) applies to a returning veteran who needs an employer accommodation for some other reason.

You have not asked for and do not need any special accommodation from ERU. The "undue hardship" affirmative defense does not apply to your situation.

Conclusion

You met the five USERRA conditions in October 2020, and you were entitled to reemployment in the position of employment that you would have attained if you had been continuously employed during the time that you were away from work for military service (September 2018 until October 2020) or another position (for which you are qualified) that is of like seniority, status, and pay. The evidence establishes that the position that you would have occupied is the position that you left and into which Mary Jones was placed and still occupies. You are entitled to that position or another position of like seniority, status,[18] and pay.

If you sue ERU, you will almost certainly prevail, assuming that the facts are as you have stated them. If you prevail, the court will order the employer to comply by reinstating you in the appropriate position.[19] The court will also order ERU to compensate you for the pay and benefits that you lost because of the delay in according you your USERRA rights.[20] If the court finds that ERU violated USERRA willfully, it will double the back pay award.[21]

Q: Where can I sue ERU?

A: Under USERRA, you can sue a private employer in the United States District Court for any district where the employer maintains a place of business.[22] There is no United States District Court in Korea, so you will need to sue the company here in the United States. Most likely, you

[17] 38 U.S.C. 4312(d)(1)(B).
[18] Location is an aspect of status. *See* Law Review 20050 (May 2020).
[19] 38 U.S.C. 4323(d)(1)(A).
[20] 38 U.S.C. 4323(d)(1)(B).
[21] 38 U.S.C. 4323(d)(1)(C).
[22] 38 U.S.C. 4323(c)(2).

will sue the company in the United States District Court for the district where the organization's headquarters is located.[23]

Q: Who will assist me and represent me in suing ERU?

A: You can file a formal, written USERRA complaint against the company with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).[24] The best way to do this is through the DOL-VETS website, www.dol.gov/vets.

DOL-VETS will investigate your complaint, and it has subpoena power.[25] When it completes its investigation, it will notify you of the results of the investigation and of your right to request referral of your case to the United States Department of Justice (DOJ).[26]

If DOJ is reasonably satisfied that you are entitled to the benefits you seek, it may represent you in filing and prosecuting your lawsuit against the private employer.[27] If DOJ decides not to represent you, it must notify you in writing of that decision.[28] At that point, you can retain private counsel and sue ERU in the appropriate federal district court.[29]

Alternatively, you can choose not to ask DOL-VETS to refer your case file to DOJ, and you can sue the private employer with your retained private counsel.[30] You can also bypass DOL-VETS altogether and file suit against ERU in the appropriate federal court with private counsel.[31]

Q: If I sue ERU in federal court with retained private counsel, can I get the court to order the employer to pay the attorney fees?

A: Yes. If you file suit with private counsel and prevail, the court *may* order the employer to pay reasonable attorney fees.[32]

Q: Can I represent myself in suing ERU in federal court?

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[23] For example, if the company's headquarters is in Los Angeles, you can sue the company in the United States District Court for the Central District of California.
[24] 38 U.S.C. 4322(b).
[25] 38 U.S.C. 4326.
[26] 38 U.S.C. 4322(e).
[27] 38 U.S.C. 4323(a)(1).
[28] 38 U.S.C. 4323(a)(2)(B).
[29] 38 U.S.C. 4323(a)(3)(C).
[30] 38 U.S.C. 4323(a)(3)(B).
[31] 38 U.S.C. 4323(a)(3)(A).
[32] 38 U.S.C. 4323(h)(2).

A: Yes, but I do not recommend that course of action. Abraham Lincoln said: "A man who represents himself has a fool for a client." And the law is so much more complicated today than it was during Lincoln's lifetime.

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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.

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 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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