

## Reporting back to Work after Weekend Drills

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Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353, and President Bill Clinton signed it into law on 10/13/1994.<sup>3</sup> USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Like the VRRA, USERRA applies to almost all employers in this country, including the Federal Government, the States, the political subdivisions of States (counties, cities, school districts, etc.), and private employers, regardless of size.

As I explained in footnote 1, the Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), has been publishing "Law Review" articles since 1997. This article is a slightly revised reprint of Law Review 156, which was originally published in the January-February 2005 issue of *The Officer* magazine.<sup>4</sup>

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<sup>1</sup> I invite the reader's attention to <http://www.roa.org/lawcenter>. You will find more than 2,000 "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 1,800 of the articles, but we are always looking for "other than Sam" articles.

<sup>2</sup> BA 1973 Northwestern University; JD 1976 University of Houston School of Law; LLM 1980 Georgetown University Law Center. I served as a judge advocate in the Navy and Navy Reserve and retired in 2007. I am a life member of ROA. I participated in the drafting of USERRA while employed as an attorney for the United States Department of Labor (1982-92). For six years (June 2009 through May 2015), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015) for a detailed discussion of the accomplishments of the SMLC. I have continued writing new "Law Review" articles as a volunteer and member of ROA. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup> Please see Law Review 15067 (August 2015) for a detailed discussion of the history of the reemployment statute.

<sup>4</sup> ROA recently changed the name of its magazine to *Reserve Voice* because the organization now represents and admits to membership enlisted personnel as well as officers.

Several ROA members have contacted me concerning the case of *Gordon v. Wawa Food Markets*.<sup>5</sup> Some have suggested that this appellate court decision is inconsistent with what I have written in some of my “Law Review” articles about USERRA. I do not think that it is inconsistent, but this is an important decision that certainly deserves a mention in this column.

This case is an excellent example of the adage that “hard cases make bad law.” Here are the tragic facts, as set forth in the plaintiff’s complaint.

In 2000, Willie Gordon was a member of the United States Army Reserve, and his unit drilled in Virginia. He lived in Vineland, New Jersey, and he worked for Wawa Food Markets, Inc. at a store in Vineland. On Sunday, September 17, 2000, he completed his Army Reserve drill weekend and drove home to Vineland. He stopped by the Vineland store to pick up his paycheck and his schedule for the coming week.

According to the complaint, the store manager ordered Gordon to work the late shift at the store that evening and threatened to fire him if he refused. Gordon worked the late shift and then drove home. While driving home, he fell asleep at the wheel and crashed, resulting in his death.

Mrs. Wanda Gordon is Willie Gordon’s mother and the administrator of his estate. She sued Wawa Food Markets, alleging that the employer violated USERRA by requiring Gordon to work the Sunday night shift and that the accident and death were the proximate result of the USERRA violation. The Federal District Court dismissed the lawsuit under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The District Court judge held that, even assuming all the facts to be as Mrs. Gordon alleged in her complaint, the law does not authorize the relief sought—money damages for the death of Willie Gordon. Mrs. Gordon appealed to the 3<sup>rd</sup> Circuit, which affirmed the dismissal.

Under section 4312(e)(1)(A)(i) of USERRA,<sup>6</sup> an employee completing a period of uniformed service that lasted fewer than 31 days is required to report for work at his or her civilian job “not later than the beginning of the first regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person’s residence.”

Willie Gordon completed his Army Reserve drill weekend late Sunday afternoon and then drove home to New Jersey, arriving Sunday evening. He would have been within his rights under

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<sup>5</sup> 388 F.3d 78 (3<sup>rd</sup> Cir. 2004). The citation means that you can find this decision in Volume 388 of *Federal Reporter Third Series*, starting on page 78. The 3<sup>rd</sup> Circuit is the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, and Pennsylvania.

<sup>6</sup> 38 U.S.C. 4312(e)(1)(A)(i).

USERRA to wait until his first regularly scheduled work period on Monday to report back to work. But Gordon was aware of his USERRA rights only vaguely, if at all.

Unfortunately, Gordon reported to work at the store and worked the late Sunday shift, probably because the store manager threatened to fire him if he did not work that shift. The Court of Appeals held: “As the District Court concluded, section 4312(e) is written entirely in terms of an employee’s duties, as opposed to an employer’s obligations. There is no way to construe the statutory language as conferring a substantive right to eight hours of rest for the returning employee.”

What can we learn from this tragedy? We can learn that it is more important than ever to get the word out to National Guard and Reserve members about their legal rights and obligations under USERRA. If Willie Gordon had been better informed about USERRA, he likely would not have stopped at the Wawa store on the way home from his drill weekend, and this tragedy would have been avoided.

#### **Please join or support ROA**

This article is one of 2,000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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 100 years 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 serving or have ever served in any of our nation’s seven uniformed services, you are eligible for ROA membership, 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](http://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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