

LAW REVIEW¹ 21044

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I Was Injured while on Active Duty—What Do I Do Now?

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[About Sam Wright](#)

- 1.1.1.7—USERRA applies to State and local governments.
- 1.1.3.2—USERRA applies to regular military service.
- 1.3.1.1—Left job for service and gave prior notice.
- 1.3.1.3—Timely application for reemployment
- 1.3.2.9—Accommodations for disabled veterans
- 1.8—Relationship between USERRA and other laws/policies

Q: I am Specialist (E-4) in the Army. I have been on active duty for almost four years and will be leaving active duty soon. I suffered a serious injury in a training accident, and I am being processed for a military disability retirement.

I graduated from high school in 2012 and joined our local police department as a rookie police officer in 2013. I worked as a police officer for three years, and in 2016 I enlisted in the Army. I told the police chief that I had enlisted, and he took me out to dinner after my last day on the job, before I reported to basic training in the Army. At the time, I intended to serve on active duty for a full career of 20 years or more, but that ambition has been frustrated by my injury and disability. When I left the police department in 2016, I had no idea that I might have the right to return to the department after leaving active duty, but recently I have read some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to 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, initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for “other than Sam” articles.

² BA 1973 Northwestern University, JD 1976 University of Houston School of Law, LLM 1980 Georgetown University Law Center. 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 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 20052 (June 2015) for a detailed discussion of the accomplishments of the SMLC. I have continued some of the work of the SMLC as a volunteer and ROA member. You can reach me by e-mail at SWright@roa.org.

Most of your USERRA articles are about how the law applies to National Guard and Reserve service members. Does USERRA also apply to Regular Army soldiers like me?

A: Yes. USERRA and the predecessor reemployment statute have always applied to persons who leave civilian jobs for voluntary or involuntary service in the Active Component, as well as the Reserve Component, of the armed forces. You will have the right to reemployment with your pre-service employer (the city) if you meet the five USERRA eligibility conditions:

- a. You must have left your civilian job to perform uniformed service. You meet this condition.
- b. You must have given the employer prior oral or written notice. You informed the police chief that you were leaving your job to enlist in the Army, and that is all that you were required to do.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. You have not exceeded the five-year limit.
- d. You must have been released from the period of service without having received a punitive or other than honorable discharge. You will meet this criterion when you leave active duty soon.
- e. After release from the period of service, you must have made a timely application for reemployment. More on this condition below.

After a period of service of 181 days or more, you have 90 days to apply for reemployment with the pre-service employer.³ If, at the time you are released from active duty, you are hospitalized or convalescing from a wound, injury, or illness incurred or aggravated during the period of uniformed service, the deadline for you to apply for reemployment is tolled (stops running) during the period of hospitalization or convalescence, and that hospitalization or convalescence period can last up to two years.⁴

Q: If I decide to wait to submit my application for reemployment, while convalescing from my injury, what is my status with the police department during that period?

A: You are not entitled to reemployment until you meet all five of the USERRA conditions, including having submitted a timely application for reemployment. If you wait to submit your application for reemployment, you are not entitled to reemployment during the convalescence period. In that situation, your application for reemployment is not late, but you have not yet made it.

³ 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁴ 38 U.S.C. 4312(e)(2)(A).

Q: Should I apply for reemployment soon after leaving active duty, or should I wait up to two years, while convalescing from my injury, before applying for reemployment?

A: That depends. First, can you afford to be without your regular income while you are convalescing for up to two years? If not, perhaps you should submit your application for reemployment soon after leaving active duty.

Is it likely that you will be more ready to return to work after a convalescence period of up to two years? If your physical condition is unlikely to improve, there is no point in waiting to apply for reemployment.

Q: If I make a timely application for reemployment and meet the other four USERRA conditions, what am I entitled to under USERRA?

A: If you meet the five conditions, the employer is required to reemploy you promptly in the position to that you would have attained if you had been continuously employed (maybe a better position than the one you left) or another position, for which you are qualified, that is of like seniority, status, and pay.⁵ If you are returning to work with a temporary or permanent disability incurred during your period of uniformed service, the employer must make reasonable efforts to accommodate the disability.⁶

Q: A police officer is required to engage in vigorous physical activity at least occasionally. It may be that there is no reasonable accommodation that the police department can make that would enable me to return to the police officer job. If so, where does that leave me?

A: If your disability makes it impossible for you to return to work as a police officer, the employer must reemploy you in “any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform *or would become qualified with reasonable efforts by the employer.*”⁷ If there is no position that is fully equivalent, the employer must reemploy you in the “closest approximation” position.⁸

Q: The police chief insists that there is no position in the police department for which I am qualified, despite my disability, or for which I could become qualified with reasonable employer efforts. Where does that leave me?

A: The employer is the city government, not just the police department. There must be a position in the city government for which you are qualified or can become qualified.

⁵ 38 U.S.C. 4313(a)(2)(A).

⁶ 38 U.S.C. 4313(a)(3).

⁷ 38 U.S.C. 4313(a)(3)(A) (emphasis supplied).

⁸ 38 U.S.C. 4313(a)(3)(B).

Q: The city attorney has stated that I am not entitled to reemployment because I did not cite USERRA when I told the police chief that I was leaving to enlist in the Army and I did not tell the chief that I would be returning to city employment after leaving the Army. What do you say about that?

A: You told the police chief that you were leaving your civilian job to perform uniformed service, and that is all that you were required to do. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer, before entering or completing uniformed service, that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.⁹

Q: After I leave active duty, I will file a claim with the United States Department of Veterans Affairs (VA) seeking benefits as a veteran with a service-connected disability. I may also file a disability claim with the Social Security Administration (SSA). Is making such claims with the VA and SSA inconsistent with suing the city under USERRA?

A: That could be a problem, but only if you claim to be “100% disabled” or “unemployable.” I have written:

You need to be very careful about asserting inconsistent claims because of the equitable doctrine of estoppel. The *Oxford Dictionary of Law* defines estoppel as follows: “A rule of law or evidence that prevents a person from denying the truth of a statement he has made or from denying the existence of facts he has alleged to exist.”

For example, there could be an estoppel problem if you tell the SSA that you are permanently and totally disabled while at the same time telling DOL-VETS [the Veterans’ Employment and Training Service of the United States Department of Labor] that you are ready, willing, and able to return to work. You need a lawyer to assist you in sorting out

⁹ 20 C.F.R. 1002.88 (bold question in original).

which claims you will make and which you will defer. Of course, this assessment may change as your physical condition improves or deteriorates.¹⁰

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This article is one of 2,200-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. We add new articles 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, including *amicus curiae* (“friend of the court”) briefs that we file in the Supreme Court and other courts, we have sought to educate service members, military spouses, attorneys, judges, employers, and others about the legal rights of service members 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 cost 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 eight¹¹ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20.00, or \$450.00 for a life membership. 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 continue and increase our support to those who serve. You can mail us a contribution to:

Reserve Organization of America
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¹⁰ Law Review 15060 (July 2015). *See also* Law Review 20005 (January 2020).

¹¹ Congress recently established the United States Space Force as the eighth uniformed service.