

LAW REVIEW¹ 21081

December 2021

Her Application for Reemployment Was Timely, and it Was Unlawful For the Employer to Make her Use PTO for the Week between her Release from Active Duty and her Application for Reemployment.

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

- 1.3.1.3—Timely application for reemployment
- 1.3.2.1—Prompt reinstatement after return from service
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.3.2.3—Pension credit for service time
- 1.3.2.11—Vacations, holidays, and days off
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a long-retired Army Reserve Colonel and a life member of the Reserve Organization of America (ROA).³ For more than 15 years, I have served as a volunteer ombudsman for the

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 collaborated 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 At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new "doing business as" name—the Reserve Organization of America. The point of the name change is to emphasize that the organization

Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have used those articles in my ESGR work.

I am working a case involving a young Army Reserve noncommissioned officer—let us call her Mary Jones. She was away from her civilian job at Daddy Warbucks Industries (DWI) for 92 days of military service, from 7/1/2021 until 9/30/2021. I have read and reread your Law Review 15116 (December 2015), and it seems clear and beyond doubt that Mary met the five conditions for reemployment under USERRA.

Mary left her job at DWI to report to active duty, and she gave the company more than a month of oral and written notice. It appears that this 92-day period of service was exempt from the computation of Mary’s five-year limit relating to her employer relationship with DWI, under the rules you discussed in detail in Law Review 16043 (May 2016), but even if this period counts, she is well within her cumulative five-year limit at DWI. She was released from active duty, as scheduled, on 9/30/2021, and she applied for reemployment exactly one week later, on 10/7/2021. I believe that she had 14 days to apply for reemployment, and she applied well within the deadline. She served honorably and did not receive a disqualifying bad discharge from the Army. Indeed, she was not discharged at all. She was released from active duty, and she returned to her former status as a part-time Army Reserve soldier.

At the time she left her job in late June, she had seven days of Paid Time Off (PTO) in the bank, and she has always planned to use that time in December, to spend Christmas with her parents. She did not apply to the company to use her PTO during the time that she was away from her DWI job for military service. The company’s personnel office was aware that she was scheduled to be released from active duty on Thursday, 9/30/2021. The company insists that she should have been back at work the next day (Friday, 10/1/2021). Because of her alleged “tardiness” in reporting back to work after her release from service, the company charged her with being “absent without leave” for the period between 9/30/2021 and 10/7/2021, and the company forced her to use her PTO during that week.

Mary is upset that she was forced to cash out her PTO balance in this way, because now she will be unable to spend Christmas with her parents. Have Mary’s USERRA rights been violated?

Answer, bottom line up front

DWI violated USERRA when it forced her to cash out her PTO balance. It was Mary’s choice, not the company’s choice, for her to use the PTO balance during her military service, or in the days

now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

following her service and before her application for reemployment, or to save that PTO balance to use later. Mary's application for reemployment was timely, and she also met the other four USERRA conditions. Mary was entitled to prompt reemployment after her timely application for reemployment, and she is entitled to be treated, for seniority and pension purposes, for the entire period that she was away from work to perform uniformed service, from 6/25/2021, her last day at work before the 92-day period of service, until 10/8/2021, when she returned to work. I will discuss each of these issues separately.

Mary's application for reemployment was timely.

Section 4312(e) of USERRA sets forth the deadline for the returning service member or veteran to report back to work or apply for reemployment, after release from the period of service, as follows:

(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—

(i) not later than the beginning of the first full 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 the safe transportation of the person from the place of that service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) *In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.*

(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

(2)

(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.⁴

Because Mary's period of uniformed service lasted more than 30 days but fewer than 181 days, she had 14 days, starting on the date of her release from active duty, to apply for reemployment.⁵ Mary applied for reemployment seven days after her release from active duty. Her application was well within the 14-day deadline. She clearly met all five of the USERRA conditions for reemployment.

It was unlawful for DWI to force Mary to use her PTO.

Section 4316(d) of USERRA provides:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. *No employer may require any such person to use vacation, annual, or similar leave during such period of service.*⁶

⁴ 38 U.S.C. § 4312(e) (emphasis supplied).

⁵ 38 U.S.C. § 4312(e)(1)(C) (italicized above).

⁶ 38 U.S.C. § 4316(d) (emphasis supplied).

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA⁷ on 10/13/1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Congress has amended USERRA several times since 1994. The first amendment was enacted two years later, on 10/9/1996.⁸ The legislative history for this specific 1996 amendment explains the purpose of the amendment as follows: "Clarify that employers may not require a person whose employment is interrupted by service to use vacation, annual, or similar leave during such service (section 406)." ⁹

DWI clearly violated section 4316(d) when it forced Mary to use her PTO balance. The company must restore the seven days of PTO. Of course, Mary will need to repay the money that she was paid for the PTO.

Q: DWI retained attorney I.B. Charlatan, of the law firm Dewey, Cheatham & Howe, to represent them in this matter. Mr. Charlatan has insisted that allowing Mary to wait seven days to apply for reemployment is inconsistent with State law and with the collective bargaining agreement (CBA) between DWI and the union that represents DWI employees, including Mary. What do you say about that?

A: If State law and the CBA are inconsistent with USERRA, USERRA trumps them. This Federal law is a floor and not a ceiling on the rights of service members and veterans. Section 4302 of USERRA provides:

- (a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.¹⁰

The Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United

⁷ Public Law 103-353, 108 Stat. 3160 (Oct. 13, 1994).

⁸ Public Law 104-275, Title III, Subtitle B, § 311(6), Oct. 9, 1996.

⁹ S. Rep. 104-371, 1996 USCCAN 3762 (Sept. 24, 1996). This legislative history can be found in Appendix E-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted language can be found on page 965 of the 2021 edition of the *Manual*. The italicized language above was added by this 1996 amendment.

¹⁰ 38 U.S.C. § 4302.

States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹¹

Almost two centuries ago, the Supreme Court established the basic principle that the Supremacy Clause means what it says and that a Federal statute trumps a conflicting State statute.¹² DWI is required to comply with USERRA even if that means violating a State statute or the CBA.

Q: Mr. Charlatan has grudgingly acknowledged, on behalf of the employer, that Mary is entitled to prompt reemployment and that she must be treated, for seniority and pension purposes, as if she had been continuously employed during the 92 days (7/1/2021 through 9/30/2021) when she was recently on active duty. Mr. Charlatan is now asserting that Mary is not entitled to seniority and pension credit for the five days (6/25/2021 through 6/30/2021) when Mary left a few days before she reentered active duty on 7/1/2021, or for the seven days (9/30/2021 through 10/7/2021) after she left active duty until she applied for reemployment on 10/7/2021. What do you say about that?

A: Mr. Charlatan is wrong. Mary is entitled to seniority and pension credit for the entire time that she was away from work to perform uniformed service. This includes the 92 days of active duty, and it also includes the five-day period between her last day at the job and her first day of active duty and the seven-day period between her last day on active duty and her application for reemployment.¹³

Please join or support ROA

This article is one of 2300-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.

¹¹ United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century. This provision is called the “Supremacy Clause.”

¹² *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹³ See Law Review 19052 (June 2019).

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 educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, 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 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 eight¹⁴ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 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 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

¹⁴ Congress recently established the United States Space Force as the 8th uniformed service.