

## LAW REVIEW<sup>1</sup> 22029

May 2022

### **USERRA Does Not Protect the Spouse of the Service Member.**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

1.1.3.9—USERRA and military family members

1.2—USERRA forbids discrimination

1.8—Relationship between USERRA and other laws/policies

***Singletary v. United Parcel Service, 828 F.3d 342 (5<sup>th</sup> Cir. 2016).***<sup>3</sup>

---

<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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 <mailto:swright@roa.org>.

<sup>3</sup> This is a decision of a three-judge panel of the United States Court of Appeals for the 5<sup>th</sup> Circuit, the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. The losing party (Singletary) did not apply to the 5<sup>th</sup> Circuit for rehearing en banc, and she did not apply to the Supreme Court for certiorari (discretionary review), and the deadline for doing so has long since passed. Thus, this case is final. The citation means that you can find this decision in Volume 828 of *Federal Reporter Third Series*, and the decision starts on page 342. I discuss this decision in detail in Law Review 18088 (September 2018).

***Norris v. Glassdoor, Inc., 2018 U.S. Dist. LEXIS 117043 (S.D. Ohio July 13, 2018).***<sup>4</sup>

**Q: I am a Lieutenant (O-3) in the Navy Reserve and a member of the Reserve Organization of America (ROA).**<sup>5</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve our country in uniform.

**I expect to be called to active duty soon, perhaps for as long as one year. I have read and reread your Law Review 15116 (December 2015), and I am convinced that I will meet the five USERRA conditions and that my right to return to my civilian job is protected by federal law. My concern is about my wife’s job.**

**My wife and I have three children under the age of seven. We both have full-time civilian jobs outside the home. That is possible because we share the childcare responsibilities. If I am mobilized and deployed outside our country, it will not be possible for me to share in the childcare responsibilities during my deployment. That will make it impossible for my wife to continue her civilian job. If my wife takes a year off, without pay, to care for the children while I am deployed, does USERRA protect her right to return to her civilian job after I return from service?**

**A: No. USERRA does not protect your wife’s right to be absent from her job because of your military service, and USERRA does not protect your wife from discrimination in her employment based on your military service.**<sup>6</sup> *I am telling you what the law is, not what I want it to be.*

**Q: What about the Family Medical Leave Act (FMLA)? Does that law give my wife any protection?**

**A: If your wife meets the stringent FMLA eligibility criteria, she has some very limited rights under the FMLA. First, your wife must have worked for a covered FMLA employer for at least 12 months.**<sup>7</sup> Second, your wife must have worked at least 1,250 hours for that employer within the 12 months before her proposed FMLA leave.

**<sup>8</sup> Third, your wife’s employer must have at least 50**

---

<sup>4</sup> This is a decision of the United States District Court for the Southern District of Ohio. The losing party (Norris) did not appeal to the United States Court of Appeals for the 6<sup>th</sup> Circuit, and the deadline for doing so has long since passed. Thus, this decision is final.

<sup>5</sup> At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-1 through O-10.

<sup>6</sup> See *Singletary* and *Norris*, cited above. USERRA simply does not apply to your wife’s employment.

<sup>7</sup> See 29 U.S.C. § 2611(2)(A)(i).

<sup>88</sup> See 29 U.S.C. § 2611(2)(A)(ii).

employees working within 75 miles of your wife's work site.<sup>9</sup> *Unless your wife meets all three of these conditions, she has no rights under the FMLA.*

*If your wife meets all three conditions, she is entitled to a few days off from her job (unpaid but job-protected) for a "qualifying exigency" arising out of your military service.<sup>10</sup> This means that your wife may be entitled to a few days off on the front end, as you are called to the colors, and a few days off on the back end to celebrate your safe return.*

*If (God forbid) you are wounded, injured, or seriously ill during your deployment, your wife is permitted to take off from her civilian job for up to 26 workweeks in a 12-month period to take care of you as you recuperate.<sup>11</sup>*

The standard circumstances for FMLA leave (unpaid but job-protected) are as follows:

- a. Birth of a son or daughter of the employee, to care for such son or daughter.<sup>12</sup>
- b. Placement of a son or daughter with the employee, for adoption or foster care.<sup>13</sup>
- c. In order to care for the spouse, son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a *serious health condition*.<sup>14</sup>
- d. Because of a serious health condition of the employee that makes the employee unable to perform the functions of the employment position.<sup>15</sup>

*Even if your wife meets the stringent FMLA criteria, the FMLA helps her very little.* That law does not give your wife the right to time off from her job, even without pay, to care for healthy children.

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

This article is one of 2,300-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 a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S.

---

<sup>9</sup> See 29 U.S.C. § 2611(2)(C).

<sup>10</sup> See 29 U.S.C. § 2612(A)(1)(E)...

<sup>11</sup> See 29 U.S.C. § 2612(a)(3).

<sup>12</sup> See 29 U.S.C. § 2612(a)(1)(A).

<sup>13</sup> See 29 U.S.C. § 2612(a)(1)(B).

<sup>14</sup> See 29 U.S.C. § 2612(a)(1)(C).

<sup>15</sup> See 29 U.S.C. § 2612(a)(1)(D).

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 almost a century, 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, 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 eight<sup>16</sup> 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](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:

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

---

<sup>16</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.