

LAW REVIEW¹ 22037

June 2022

**Depriving You of Paid Military Leave under
5 U.S.C. § 6323 Violates USERRA.**

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

1.1.1.7—USERRA applies to State and local governments

1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

2.0—Paid leave for government employees who are Reserve Component members

Q: I am a Staff Sergeant (E-5) in the Air National Guard and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review”

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 Spouses’ 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 46 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

articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related laws. For several years, and until recently, I was an employee of the District of Columbia (DC) Government, and my DC Government supervisors frequently gave me a hard time about my Air National Guard service and my absences from work that my service necessitated, although those absences were clearly protected by USERRA.

From reading several of your “Law Review” articles, including Law Review 21077 (December 2021), I understand that Federal employees *and DC Government employees* are entitled to 15 workdays of *paid* military leave per Federal fiscal year. During my DC Government employment, I applied each year for this paid military leave, and the DC Government agency that employed me simply refused to pay me this entitlement. The amount of money that I am owed comes to about \$15,000.

My first question: Was I entitled, as a DC Government employee, to 15 workdays of paid military leave per fiscal year?

A: Clearly yes. The entitlement to paid military leave under section 6323 of title 5 of the United States Code expressly applies to a Federal employee “*or an individual employed by the government of the District of Columbia.*”⁴

Q: From reading your articles, I believe that the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS) is responsible for enforcing USERRA against employers, including Federal, State, local, and private sector employers. I made a formal, written USERRA complaint against the DC Government to a DOL-VETS employee—let us call him “Joe Smith.” Mr. Smith refused to consider my complaint and rejected it out of hand, saying: “Our authority is to enforce USERRA. We do not have the authority to enforce section 6323 of title 5.”

Is Mr. Smith correct?

A: No, Mr. Smith is wrong. What he failed to understand is that when a Federal or DC Government agency refuses to pay benefits owed under section 6323 it thereby violates USERRA. The United States Court of Appeals for the Federal Circuit⁵ has held:

USERRA provides that a member of “a uniformed service shall not be denied ... any benefit of employment by an employer on the basis of that membership.” 38 U.S.C. . §

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

⁴ 5 U.S.C. § 6323(a)(1) (emphasis supplied).

⁵ 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 (MSPB).

4311(a) (emphasis added). The term “benefit of employment” is given an “expansive interpretation.” *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484-85 (Fed. Cir. 1998); *see also Peterson v. Department of the Interior*, 71 M.S.P.R. 227, 237 (1996). It includes “any advantage, profit, privilege, gain, status, account, or interest ... that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice.” 38 U.S.C. § 4303(2). To the extent that it is not already clear from *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1336, we restate that military leave afforded by 5 U.S.C. § 6323(a) is a benefit of employment. Indeed, military leave “accrues by reason of” Pucilowski’s employment with the government, and the fact that it is a benefit afforded him by force of statute makes it no less a part of his “employment agreement” than if it had been negotiated by collective bargaining or any other process.⁶

Your complaint that the DC Government, as your employer, violated section 6323 of title 5 is a complaint that the DC Government has violated USERRA, and DOL-VETS is required to investigate your complaint, just like any other USERRA complaint against the DC Government.

Q: How is USERRA enforced against a Federal executive agency as employer?

A: A person who claims that his or her employer (Federal, State, local, or private sector) has violated his or her USERRA rights “may file a complaint with the Secretary [of Labor]⁷ in accordance with subsection (b), and the Secretary shall investigate such complaint.”⁸ After completing its investigation, and if the investigation did not result in a resolution of the complaint, DOL-VETS is required to report to the complainant the results of the investigation and the complainant’s options for enforcing USERRA.⁹

If the complaint is against a Federal executive agency, as employer, and if the complainant requests referral, DOL-VETS must refer the case file to the Office of Special Counsel (OSC).¹⁰ If OSC is “reasonably satisfied” that the complainant is entitled to the benefits that he or she seeks, OSC files an action in the Merit Systems Protection Board (MSPB) and acts as the attorney for the complainant in prosecuting the action.¹¹

⁶ *Pucilowski v. Department of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007) (emphasis in original).

⁷ This does not mean that the Secretary of Labor personally receives USERRA complaints and conducts USERRA investigations. The responsibilities imposed upon the “Secretary” are to be fulfilled “through the Veterans’ Employment and Training Service.” 38 U.S.C. § 4321.

⁸ 38 U.S.C. § 4322(a).

⁹ 38 U.S.C. 38 U.S.C. § 4322(e).

¹⁰ 38 U.S.C. § 4324(a)(1).

¹¹ 38 U.S.C. § 4324((a)(2)(A). *See generally* Law Review 07055 (October 2007) for a detailed description of the USERRA enforcement process with respect to Federal executive agencies as employers.

The MSPB then adjudicates the USERRA claim.¹² The complainant, but not the agency, can appeal the final MSPB decision to the United States Court of Appeals for the Federal Circuit.¹³

Q: How is USERRA enforced against a State or local government or a private employer?

A: If the defendant-employer is a State or local government or a private employer, DOL-VETS refers the case file to the United States Department of Justice (DOJ) instead of to OSC.¹⁴ If DOJ is “reasonably satisfied” that the claim has merit, DOJ will file the lawsuit in the appropriate Federal district court, which in your case would be the United States District Court for the District of Columbia.¹⁵ Either party can appeal the District Court's decision to the United States Court of Appeals for the District of Columbia Circuit.¹⁶

Q: For USERRA purposes, is the DC Government treated like part of the Federal Government, or is it treated like a State?

A: The DC Government is treated like a State for USERRA purposes.¹⁷

Q: Are the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit bound by Federal Circuit precedential decisions like *Pucilowski*?

A: No, they are not bound, but they should and almost certainly will follow the *Pucilowski* precedent and hold that denial of paid military leave under section 6323 amounts to a violation of USERRA.

Q: Can I obtain private counsel and sue the DC Government in Federal district court?

A: Yes, but there may be a problem in finding a private lawyer willing to undertake this case on a contingent fee basis, because of the modest amount of money at stake (approximately \$15,000). It makes no sense for you to spend \$20,000 in attorney fees trying to recover \$15,000. It makes even less sense for an attorney or law firm to take on this case on a contingent fee basis, where the attorney agrees to represent you in exchange for a percentage of the recovery.

¹² 38 U.S.C. § 4324(c).

¹³ 38 U.S.C. § 4324(d).

¹⁴ 38 U.S.C. § 4323(a)(1).

¹⁵ 38 U.S.C. § 4323(b)(1), 4323(c)(1).

¹⁶ The DC Circuit is not the same court as the Federal Circuit, which was established in 1982. The DC Circuit was established much earlier.

¹⁷ Section 4303 of USERRA defines 17 terms used in this law, and the definition of the term “State” expressly includes “the District of Columbia.” 38 U.S.C. § 4303(14). See generally Law Review 17049 (May 2017) for a detailed discussion of the treatment of the DC Government for USERRA purposes.

Q: Is it not true that USERRA provides that if I proceed with private counsel and prevail the court can order the employer to pay my attorney fees?

A: Yes, that is true.¹⁸ It is possible that you could find a private attorney who is willing to represent you on that basis, but in your situation the most effective way to enforce your USERRA rights is through DOL-VETS and DOJ.

USERRA's legislative history clearly indicates that Congress intended that DOL-VETS and DOJ would assist those whose USERRA rights have been violated.¹⁹

Please join or support ROA

This article is one of 2,000-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 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. 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 eight²⁰ 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

¹⁸ 38 U.S.C. § 4323(h)(2).

¹⁹ House Committee Report, House Committee on Veterans' Affairs, April 28, 1993, H.R. Rep. 103-65 (Part 1). This committee report is reprinted in its entirety in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted sentence can be found on page 798 of the 2021 edition of the *Manual*.

²⁰ Congress recently established the United States Space Force as the 8th uniformed service.

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 20002²¹

Here is the letter that I sent to the Honorable Kurt A. Racine, Attorney General of the District of Columbia, urging him to ensure that DC Government agencies comply with USERRA and with section 6323 of title 5 of the United States Code. If he responds, we will post his response here.

May 7, 2022

Honorable Kurt A. Racine

Attorney General of the District of Columbia

400 Sixth St. NW

Washington, DC 20001

Re: Please ensure that DC Government agencies comply with 5 U.S.C. § 6323

Dear Mr. Racine:

I invite your attention to 5 U.S.C. § 6323. For your convenience, I am including in this letter, below, the complete text of this section. I have copied this text directly from the United States Code, using my LEXIS account. The only change that I made is to highlight “or the District of Columbia” in the text.

Here is the text of section 6323:

§ 6323. Military leave; Reserves and National Guardsmen

(a)

(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title [5 USCS § 2105] **or an individual employed by the government of the District of Columbia**, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title

²¹ You can also donate on-line on our website, www.roa.org.

32), or engaging in field or coast defense training under sections 502–505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title [5 USCS § 3401(2)]), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.

(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title [5 USCS § 5519], an employee as defined by section 2105 of this title [5 USCS § 2105] **or an individual employed by the government of the District of Columbia**, permanent or temporary indefinite, who—

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and

(2)

(A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury—

(i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or

(ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or

(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year. Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title [5 USCS § 2105] **or an individual employed by the government of the District of Columbia**, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d)

(1) A military reserve technician described in section 8401(30) [5 USCS § 8401(30)] is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.

(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519 [5 USCS § 5519].

5 USCS § 6323 (emphasis supplied).

In an at least one instance of which I am aware, and probably many more instances that have not been brought to my attention, DC Government agencies have simply refused to pay for paid military leave under section 6323. They profess ignorance of this provision, but of course ignorance of the law is no excuse.

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As a sample, I invite your attention to our Law Review 22037 (June 2022), and for your convenience I am enclosing a copy of that article. This article will be added to our website on or about 6/1/2022, and there may be some additional editing before the article is published.

The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997, and we add new articles each month. I am the author of more than 90% of the articles published so far, but we are always looking for "other than Sam"

articles by other lawyers. I am 71 and will not be around forever to write and update these articles.

We would certainly welcome an article by you or a member of your staff about how DC law protects the interests of those who serve or have served our country in uniform and how your office acts to enforce those laws. Please contact me or have a member of your staff contact me to discuss the details.

The "Law Review" articles that are available at www.roa.org/lawcenter are available for free to everyone, not just ROA members. There is no toll booth on the road to the Law Review Library. I hope that you and members of your staff will find our Law Review Library to be a valuable resource for legal research on military-legal topics.

Thank you for your attention, and have a great Navy day.

Very respectfully,

Samuel F. Wright