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USERRA Forbids Discrimination, and that Includes Discrimination in Hiring. Law Firms Are Not Exempt.

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

1.1.2.5—USERRA applies to executive and professional employees

1.2—USERRA forbids discrimination

Q: I am the managing partner of a major “white shoe” law firm.³ Our firm has been in existence for 150 years, and we intend for it to remain in business for at least another 150 years. Each year, we hire several recent law school graduates to serve as “associates” at our firm. An associate is a salaried employee of the firm. A lawyer typically works in that capacity for about seven years, and then we, as a firm, decide whether to offer the lawyer the opportunity to join our firm as a partner. Those who are not offered the opportunity to become partners, or who decline our partnership offers, normally leave the firm at that point.

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 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>.

³ The factual set-up for this article is hypothetical but realistic.

We offer top dollar to our associates, and we only hire the very best candidates—new lawyers who graduated at or near the top of their classes at our nation's best law schools. I am considering this year's candidates for hiring as associates. One of the candidates is a new attorney—let us call him “Joe Smith.” He graduated from the United States Naval Academy in 2007 and then served on active duty as a naval aviator for the next ten years, until 2017. He left active duty and attended law school, graduating in 2022. He took the bar exam in this state and was the high-scorer among all candidates taking the bar exam in February 2022 in this state.

He applied to this firm, and I was about ready to offer him one of our associate positions when I saw him in our neighborhood grocery store on a Sunday evening, and he was in his Navy uniform. I spoke to him, and he told me that he was in uniform because he was on his way home from his Navy Reserve drill weekend.

I thought that Joe had left the Navy altogether in 2017. It bothers me that he has continuing obligations to the Navy. Our new associates are expected to work 70 hours or more per week and to generate billable hours for the firm. I think that associates, especially new associates, should be devoting their entire attention to their work at this firm, to the exclusion of any other employment or activity.

On Monday morning, at the firm, I discussed this matter with a senior partner who heads up our employment section, advising and representing employers in employment law matters. I told my partner that I was considering striking Joe Smith's name from our list of new associates, because I am concerned about his divided loyalties, to the Navy and the firm. My partner told me about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and suggested that it could be a violation of USERRA for us to change our mind about offering employment to Smith based on his Navy Reserve affiliation and obligations.

I tasked one of our associates to do Internet research on USERRA, and she found one of your “Law Review” articles. Does USERRA forbid discrimination *in initial hiring*?

A: Yes. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

Does USERRA protect against discrimination in initial hiring decisions?

Yes. The Act's definition of employer includes a person, institution, organization, or other entity that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employer need not actually employ an individual to be his or her “employer” under the Act, if it has denied initial employment on the basis of

the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employer would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the company or entity denying employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.⁴

Q: I can see maybe hiring a reservist for a clerical or support position, but I have a real problem hiring a reservist as a lawyer. Does USERRA apply to professional and executive positions?

A: Yes. "USERRA applies to all employees. There is no exclusion of executive, managerial, or professional employees."⁵

Q: We recorded all of our interview sessions with prospective associates, and I have reviewed all of those recordings. During our interview of Smith, he did not mention and we did not ask him about his membership in the Navy Reserve, and we were not aware of his membership at the time. If I decide to select another candidate instead of Smith, how would he or anyone else ever know that?

A: If you decide not to select Smith because of his Navy Reserve membership, you are violating the law, even if it is most unlikely that he will sue. "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business or personal affairs."⁶

Q: I do not like this law, USERRA. Here at this law firm, our duty is to our clients, and our goal is to make as much money as possible without violating any laws or ethical rules. Why should I, as the managing partner, have to put up with an associate attorney who wants time off to play sailor in the Navy Reserve, any more than I have to put up with an associate who wants to take time off for Spring Training, trying to make a Major League Baseball team. What do you say about that?

⁴ 20 C.F.R. § 1002.40 (bold question and bold "yes" in the original).

⁵ 20 C.F.R. § 1002.43.

⁶ American Bar Association, Model Rules of Professional Conduct, Preamble, Paragraph 5.

A: It has now been two generations since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973. Those who are considering enlistment today have never faced the prospect of being drafted, and neither have their parents. No one has been drafted by our country since the grandparents or great-grandparents of today's service members were of military age.

Relying exclusively on volunteers, our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that it is never necessary for our country to reinstate the draft.

Defending our country in a dangerous world, without relying on compulsion to fill the ranks, means that our nation must maximize the incentives and minimize the disincentives to military service in the Active Component, the Reserve, and the National Guard.

Most of the 2,000 articles in our "Law Review" series⁷ address laws that seek to minimize the disincentives to service. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the concerns of the service member or potential service member that he or she will lose out on civilian job opportunities because of service to our country in uniform. The Servicemembers Civil Relief Act (SCRA) addresses the concerns of the service member that he or she will lose the opportunity to be heard in a civil or administrative proceeding back home because he or she is serving in uniform hundreds or thousands of miles away or that he or she will have to continue paying rent for an apartment that is no longer needed because he or she has enlisted or has been called to active duty.

I invite the reader's attention to Law Review 14080 (July 2014), by Nathan Richardson⁸ and myself. In that article we wrote:

Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country in the armed forces. In the All-Volunteer Military recruiting is a constant challenge. Despite our country's current [2014] economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have

⁷ Please see footnote 1.

⁸ At the time (summer 2014), Nathan Richardson was an unpaid summer intern at the Service Members Law Center, of which I was the Director. Nathan is now a lawyer in New York City.

more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicines for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There definitely is a compelling interest in the enforcement of USERRA.

As Nathan Richardson and I predicted in 2014, the services (and especially the Army) have suffered from recruiting shortfalls and this year is the most challenging year for military recruiting since the draft was abolished in 1973.

While I am very glad that Congress abolished the draft 50 years ago, I also think that conscription is constitutional, justified, and necessary when our nation is unable to recruit enough volunteers. In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.⁹

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early

⁹ Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.

20th Century) and by drafting young men into military service.¹⁰ A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.¹¹

No one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 21st anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, Active Component (AC) and Reserve Component (RC), have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

¹⁰ No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

¹¹ *Arver v. United States*, 245 U.S. 366 (1918).

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 21 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, almost 50 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor.

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren.

You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

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 eight¹² 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 20002¹³

¹² Congress recently established the United States Space Force as the 8th uniformed service.

¹³ You can also contribute on-line at www.roa.org.