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What Is "Noncareer" Service? Does USERRA Protect Career Service?

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

1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service

Q: I am a Colonel in the Army Reserve and a life member of the Reserve Organization of America (ROA).[3] For years, I have been a loyal reader of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.

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

The first section of USERRA reads as follows:

> **(a)** The purposes of this chapter are—
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> **(1)** to encourage *noncareer* service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
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> **(2)** to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
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> **(3)** to prohibit discrimination against persons because of their service in the uniformed services.
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> **(b)** It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.[4]

How did the word "noncareer" come to be included in first section of USERRA? What does this word mean? Is "career" service in the uniformed services protected by USERRA?

A: As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA[5] and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Two Department of Labor (DOL) attorneys, Susan M. Webman and I, largely drafted a proposed VRRA rewrite, and President George. H.W. Bush presented that draft to Congress, as his proposal, in February 1991. The version of USERRA that was signed into law on 10/13/1994 was 85% the same as the Webman-Wright draft. The draft that President Bush presented to Congress simply referred to the intent to "encourage service in the uniformed services."

In April 1991, I spent a long day with Chuck Lee, then the General Counsel of the Senate Veterans' Affairs Committee, chaired by Senator Alan Cranston of California. We pored over President Bush's draft line-by-line, and Chuck suggested ways that Senator Cranston would want to change the language that we had drafted for President Bush. He proposed to add "nonregular" as a qualifier of the kind of uniformed service that the law was intended to encourage.

I strenuously objected, pointing out that the reemployment statute had always applied to service in the Regular military as well as the National Guard and Reserve.[6] I insisted that the

[4] 38 U.S.C. § 4301 (emphasis supplied).
[5] Public Law 103-353, 108 Stat. 3162.
[6] *See generally* Law Review 22065 (October 2022).

statute should not limit the kind of uniformed service that USERRA is intended to encourage, but Chuck Lee stated that Senator Cranston would insist on a word modifying or limiting the kind of uniformed service. The word "noncareer" was included in the law as enacted in 1994. If it had been up to me, no modifier would have been included.

I contend that the word "noncareer" is nothing more than shorthand for the five-year limit, including its nine exemptions, set forth in section 4312(c) of USERRA.[7] But the fact that the word is in the statute gives employers grounds to argue that there is an additional limitation on USERRA rights and that "career" service is not protected.

As I have explained in Law Review 19102 (November 2019) and other articles, the definitive reference book on USERRA is *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. In their book, they address the "career service" question as follows:

> The U.S. Court of Appeals for the Federal Circuit and some lower courts following its lead have held that an employee will waive entitlement to reemployment rights under USERRA by abandoning a civilian career for a military career.[8] In determining such waiver, the test applied by the Federal Circuit is "whether or not a civilian employee intended to abandon his civilian career and commence career service within the military."[9] Cases finding a "career service" waiver typically have involved claimants with extremely long periods of pre-USERRA service that was exempt from the prior statute's service limit and as such not subject to USERRA's service limit.[10]
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> However, application of the career-service waiver theory to deny reemployment rights to a returning service member who meets all of USERRA's reemployment-eligibility requirements necessarily would conflict with the operation of the Act. Section 4312(a) of USERRA mandates entitlement to reemployment rights for persons who satisfy the Act's reemployment-eligibility criteria, none of which limit protected service to noncareer service.[11]

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[7] 38 U.S.C. § 4312(c).

[8] *See, e.g., Woodman v. Office of Personnel Management,* 258 F.3d 1372, 1377-78 (Fed. Cir. 2001); *Sutton v. City of Chesapeake,* 713 F. Supp. 2d 547, 551 (E.D. Va. 2010); *Barker v. Office of the Adjutant General of State,* 907 N.E.2d 574, 581 (Ind. Ct. App. 2009).

[9] *Dowling v. Office of Personnel Management,* 393 F.3d 1260, 1262 (Fed. Cir. 2004).

[10] *See, e.g., Moravec,* 393 F.3d at 1261 (16 years in Active Guard Reserve); *Dowling,* 393 F.3d at 1261 (12 years in Active Guard Reserve);*Woodman,* 258 F.3d at 1378 (14 years in Active Guard Reserve); *Barker,* 907 N.E.2d at 580 (17 years in Active Guard Reserve). . . .

[11] *See United States v. Nevada,* 817 F. Supp. 2d 1230, 1239 (D. Nev. 2011). ("Section 4312(a) expressly governs whether a returning service member is entitled to the reemployment rights and benefits of USERRA and contains no requirement that a service member be 'noncareer' to be entitled to protection—at least not in those terms.")

The only exceptions to such entitlement are the circumstances described in the three affirmative defenses set forth at section 4312(d)(1), which do not include an abandonment-of-civilian-career defense. Furthermore, an oft-overlooked provision of USERRA, section 4312(h), expressly forbids denying USERRA rights on the basis of the timing, duration, frequency, or nature of a person's military service if the person has not exceeded the Act's five-year service limitation and has complied with the Act's pre and post-service notification requirements.[12] Thus, even if a person's service were in the nature of military career, section 4312(h) would bar consideration of that fact in determining the person's right to reemployment so long as the person were otherwise reemployment eligible.

In any event, with the exception of cases involving employees with long periods of pre-USERRA service, there is scant chance that an employee who complied with USERRA's five-year service limit would be found to have abandoned a civilian career. Although espousing the view that such a waiver is possible even if an employee falls within the service limit, the Federal Circuit vacated a decision of the Merit Systems Protection Board holding that an employee who fell within the five-year limit abandoned his civilian career in favor of a military career.[13] The fact that the employee did not exceed the five-year limit was of especial significance in the court's rejection of the Board's determination. "Because the five-year limit provides a distinct termination point for USERRA's reemployment rights, the enactment of that statutory period makes it reasonable to assume that, absent clear evidence to the contrary, employees who have not exceeded that period do not intend to abandon their civilian positions," said the court.[14]

Similarly, the federal district court in Nevada refused to find that an employee who fell within USERRA's five-year service limit had abandoned his civilian career.[15] The court rejected a contention that the employee was ineligible for and waived his reemployment rights under USERRA when he extended his military absence by volunteering for service beyond his initial deployment. That the employee so extended

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[12] 38 U.S.C. § 4312(h) provides that—

> In any determination of a person's entitlement to protection under this chapter, the timing, frequency, or duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in section (a)(1) and the notification requirements established in subsection (e) are met.

[13] *Erickson v. United States Postal Service,* 636 F.3d 1353 (Fed. Cir. 2011). NOTE: In this decision the Federal Circuit considered whether a former employee waived a discrimination claim under USERRA due to alleged abandonment of his civilian career. . . .

[14] *Erickson,* 636 F.3d at 1358.

[15] *United States v. Nevada,* 817 F. Supp. 2d at 1239-40.

> his absence was immaterial, said the court, because in light of his compliance with the five-year limit, section 4312(h) barred consideration of the timing, frequency, duration, and voluntary nature of his service in determining his entitlement to reemployment.[16]

I fundamentally disagree with the career-abandonment theory because it seems to imply that it is not possible to have a dual career—a full-time civilian job that extends for a career and a part-time career in the National Guard or Reserve that requires frequent short absences for training and occasional recalls to active duty for months or years at a time. With the legal protections of USERRA, and with a reasonably cooperative civilian employer, a dual-career track is entirely feasible and desirable.[17]

Q: I am 47 years old. I was born in 1975 and graduated from college in 1997. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC). When I graduated, I was commissioned a Second Lieutenant in the Army. I then served on full-time active duty for exactly 14 years, from May 1997 until May 2011, when I was released from active duty and affiliated with the Army Reserve. I started a Federal civilian job in August 2011, three months after I left active duty.

I was a traditional reservist from May 2011 until 10/1/2016, when I was involuntarily called to active duty, with my Army Reserve unit, for one year, from 10/1/2016 until 9/30/2017. After that one year of involuntary active duty, I served on voluntary Active Guard and Reserve (AGR) duty for five years, from 10/1/2017 until 9/28/2022.

I gave my civilian employer (a Federal agency in the Executive Branch) advance oral and written notice of my call to active duty in September 2016, and I notified them that I had voluntarily extended my active duty. I have read and reread your Law Review 15116 (December 2015), about the five conditions for reemployment under USERRA, and I am confident that I met those five conditions. I left my Federal civilian job to perform uniformed service, and I gave prior oral and written notice. I served honorably and retired from the Army on 9/28/2022, based on exactly 20 years of full-time active duty (14 years from 1997 to 2011 and an additional six years from 2016 to 2020). I served honorably. I applied for reemployment with the Federal agency on 10/3/2022, well within the 90-day deadline to apply for reemployment.

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[16] *The USERRA Manual* (Thomson Reuters 2022), by Kathryn Piscitelli and Edward Still, section 4:22. The quoted paragraphs can be found on pages 190-92 of the 2022 edition of the *Manual. See also* "Abandonment Doctrine Rests on Slender Reed," Law Review 14005 (January 2014).

[17] *See* Mark Garrett, *Pursuing Dual Careers in Higher Education and the Military*, HIGHERED MILITARY https://www.higheredmilitary.com/news/articleDisplay.cfm?ID=2593. (last visited Nov. 22, 2022).

I have also read and reread your Law Review 16043 (May 2016), about the five-year limit. I am confident that I am within the limit, albeit just barely. The way I figure it, I have used exactly four years, 11 months, and 28 days of my five-year limit. What do you think?

The personnel office of the Federal agency where I worked from 2011 until 2016 insists that I am not entitled to reemployment because my military service was "career" service not "noncareer" service. The personnel office points to the fact that I am receiving regular military retirement, not Reserve Component retirement at age 60. What do you say about this?

A: Based on the legal principles and case citations discussed above, I have concluded that it is irrelevant that you are receiving regular military retirement. You have met the five USERRA conditions for reemployment, and that means that you are entitled to reemployment, including treating you as if you had been continuously employed by the Federal agency for the entire time that you were away from work for active-duty service (2016 to 2022). It may be necessary for you to bring a legal action against the agency in the Merit Systems Protection Board (MSPB), but I am confident that you will prevail.

You have not exceeded the five-year limit with respect to your employer relationship with this particular Federal agency. The 14 years of active duty that you performed from 1997 to 2011 does not count toward the five-year limit because you performed that service before you began your Federal civilian career.[18] The drill weekends and annual training periods that you performed between 2011 and 2016 do not count toward your limit.[19] The year of involuntary active duty that you performed from October 2016 until September 2017 does not count toward your five-year limit.[20] The voluntary AGR duty that you performed starting in October 2017 counts toward your five-year limit, but that period is two days short of the limit.

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ROA is more than 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

[18] *See* 38 U.S.C. § 4312(c). That subsection provides that the five-year limit is computed "with respect to the employer relationship for which a person seeks reemployment."
[19] *See* 38 U.S.C. § 4312(c)(3).
[20] *See* 38 U.S.C. § 4312(c)(4)(A).

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[21] 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
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[21] Congress recently established the United States Space Force as the 8th uniformed service.
[22] You can also contribute on-line at www.roa.org.