

Brigadier General Michael J. Silva Won an Important, Precedent-Setting USERRA Case in 2009 Preserving USERRA Rights for Dual Employees

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Subject Index Codes:

1.1.1.1—USERRA applies to hiring halls and joint employers

1.1.1.8—USERRA applies to the Federal Government

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Silva v. Department of Homeland Security, 2009 M.S.P.B. 189 (2009).

We mourn the recent loss of Brigadier General Michael J. Silva, USAR, a life member of the Reserve Organization of America (ROA) who served a career in the Army and Army Reserve (including combat service in Iraq) and held important ROA offices at the chapter (local), department (state), and national levels, culminating in serving as our National President from 2013 to 2015. General Silva was a great supporter of the Law Review Library and the Service

¹ Please see 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, 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.

² BA 1973, Northwestern University; JD (law degree), 1976, University of Houston, LLM (advanced law degree), 1980, Georgetown University. I served on active duty and in the Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and I currently serve on the Executive Committee and as Chairman of the Membership Committee. I took part in the drafting of USERRA, to replace the 1940 reemployment statute, while employed as an attorney for the United States Department of Labor (DOL). I have also worked with USERRA and the predecessor reemployment statute as a Navy judge advocate, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and as an attorney for the United States Office of Special Counsel (OSC). For six years (June 2009 through May 2015), I was a full-time employee of ROA, serving as the first Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC. My paid ROA employment ended 5/31/2015, but I have continued many of the SMLC functions as a volunteer and ROA member. You can reach me by e-mail at SWright@roa.org.

Members Law Center, possibly because of his own difficulties in enforcing his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) when he left his civilian job in 2006 to deploy to Iraq and when he returned in 2007 to seek reemployment.

From June 2005 until May 2006, Silva was employed by a company called SPS Consulting LLC, a company that had a contract with the United States Department of Homeland Security (DHS). SPS provided employees to fill two positions at the headquarters of a DHS component, United States Customs & Border Protection (CBP). Silva held one of those two positions, the Financial Manager (FM) position. In that capacity, he worked at a CBP facility and worked directly with CBP employees. Although Silva was not a federal employee in the traditional sense, DHS and SPS each had control over important aspects of his employment. In legal parlance, DHS and SPS were his “joint employers.”³

In February 2006, General Silva was selected to command the 411th Engineers, an Army Reserve engineering unit that was scheduled to mobilize and deploy to Iraq in May 2006. He gave notice to both SPS and DHS that he would be leaving his civilian job to serve our country in Iraq, and he suggested a specific person to fill his civilian job on an interim basis while he was serving in Iraq. At the request of DHS, SPS hired the person that Silva had suggested to fill the FM position while General Silva was on active duty in Iraq, and the interim fill did well. General Silva remained on active duty for 15 months, mostly in combat in Iraq. When he left active duty in August 2007, he met the five USERRA conditions for reemployment:

- a. He left his civilian job to perform uniformed service.⁴
- b. He gave prior notice to the civilian employer.⁵
- c. He did not exceed the five-year limit on the duration of his service.⁶
- d. He served honorably and was released from active duty without having received a disqualifying bad discharge from the Army.⁷
- e. After he was released from active duty, he made a timely application for reemployment with his pre-service employer. He applied to both SPS and DHS.⁸

³ The Capitol Hill newspaper called *The Hill* has reported that 4.1 million individuals work for the Federal Government as contract employees, on top of the 2.1 million who are traditional federal employees. Kristin Tate, *The sheer size of our government workforce is an alarming problem*, THE HILL (Apr. 14, 2019), <https://thehill.com/opinion/finance/438242-the-federal-government-is-the-largest-employer-in-the-nation/#:~:text=The%20federal%20government%20employs%20nearly%209.1%20million%20workers%2C,personnel%20and%20more%20than%20500%2C000%20postal%20service%20employees.>

⁴ 38 U.S.C. 4312(a).

⁵ 38 U.S.C. 4312(b).

⁶ 38 U.S.C. 4312(c). As Wright has explained in detail in Law Review 16043 (May 2016) and other articles, there are nine exemptions—kinds of service that do not count toward exhausting a person’s five-year limit.

⁷ 38 U.S.C. 4304.

⁸ After a period of service of fewer than 31 days, the person is required to report back to work at the start of the first scheduled work period on the first calendar day after release from the period of service and the time

SPS initially offered to reemploy Silva in the FM position, as required by USERRA, but the DHS Contracting Officer's Technical Representative (COTR) strenuously objected and told SPS that the contract with the company would be canceled if it reinstated Silva to his pre-service position. The COTR was most pleased with the performance of the interim fill and did not want to see her displaced.

As First Lieutenant Tara C. Buckles and I explained in detail in Law Review 23001 (January 2023), USERRA requires the civilian employer to reinstate the returning veteran in the appropriate position of employment *even if that means that the interim fill must be displaced*. USERRA would not be worth much if the employer were able to defeat the rights of the returning veteran simply by filling the position.

After he was not reemployed, as required by USERRA, Silva filed a formal, written USERRA complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), alleging that both SPS and DHS had violated USERRA when they refused to reinstate him. DOL-VETS investigated his complaint and found it to have merit. The agency referred Silva's complaint against SPS to the United States Department of Justice (DOJ) and his complaint against DHS to the United States Office of Special Counsel (OSC).

DOJ refused Silva's request for representation, and in accordance with standard DOJ practice declined to explain the rationale for the declination. Silva then retained private counsel (ROA life member Thomas Jarrard) and sued SPS in the United States District Court for the Eastern District of Virginia, in accordance with section 4323 of USERRA.⁹ That lawsuit settled for an undisclosed but apparently substantial amount.

In accordance with section 4324 of USERRA,¹⁰ DOL-VETS referred Silva's complaint against DHS to the United States Office of Special Counsel (OSC). That agency filed suit against DHS in the United States Merit Systems Protection Board (MSPB).¹¹ DHS argued that the MSPB did not have authority because Silva was never a federal employee in the traditional sense. The MSPB rejected the DHS argument, holding that DHS was the joint employer of Silva, and when DHS (through the COTR) stood in the way of Silva's exercise of his right to reemployment, DHS violated USERRA and the MSPB had the authority and responsibility to order relief.

reasonably required for safe transportation from the place of service to the person's residence plus eight hours (for rest). 38 U.S.C. 4312(e)(1)(A)(i). After a period of service of more than 30 days but fewer than 181 days, the person has 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

⁹ 38 U.S.C. § 4323.

¹⁰ 38 U.S.C. § 4324.

¹¹ The MSPB is a quasi-judicial agency in the Executive Branch of the Federal Government.

Importance of this case

More than four million Americans work for the Federal Government as contract employees, on top of the 2.1 million traditional federal employees. Thousands of those contract employees have left their civilian jobs or will leave their civilian jobs to serve our country in uniform. As a result of the *Silva* precedent, these contract employees have an effective way to enforce their USERRA rights against federal Executive Branch agencies that try to stand in the way of USERRA enforcement.

Please join or support the Reserve Organization of America (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, and we add new articles each month.

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 security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national 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, ESGR volunteers, DOL investigators, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We supply information to service members, without regard to their membership status, or lack thereof, in our organization, but please understand that ROA members, through their dues and contributions, pay the cost of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any of our country’s eight uniformed services,¹² you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.¹³ Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve. If you are eligible, please join. You can

¹² Congress recently created the United States Space Force as the eighth uniformed service.

¹³ If you are under the age of thirty-five, you can become an associate member for free for five years or until you turn thirty-five, whichever comes first.

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Reserve Organization of America
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¹⁴ You can also contribute on-line at www.roa.org.