

LAW REVIEW¹ 23011

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Enforcing USERRA against a Private Employer

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Q: I am an Army Reserve Colonel and a life member of the Reserve Organization of America (ROA).³ 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 who serve our country in uniform.

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 participated 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.

³ In 2018, the members of the Reserve Officers Association amended the organization’s constitution and made all past and present uniformed services personnel (E-1 through O-10) eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name “Reserve Organization of America” (ROA) to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

I was born in 1972, and I graduated from college in 1994. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC), and when I graduated on May 15, 1994, I was commissioned a Second Lieutenant. I remained on full-time active duty for exactly five years, until May 1999, when I was released from active duty and affiliated with the Army Reserve. In July 1999, a few weeks after I left active duty, I was hired by a large company (let us call it "Daddy Warbucks Industries" or DWI).

I have worked continuously for DWI since 1999, but my DWI career has been interrupted several times for military training and service. I have performed drill weekends every month and annual training every year. Twice, I was involuntarily recalled to active duty for service in Southwest Asia, in 2003-04 and 2009-10. I volunteered to return to active duty for 24 months in 2013-15 and for another 30 months, from January 2020 until July 2022.

I was released from active duty on 7/15/2022 and applied for reemployment at DWI a month later, on 8/15/2022, well within the 90-day deadline to apply for reemployment after a period of service that lasted for 181 days or more.⁴

I have read and reread your Law Review 15116 (December 2015), and I am convinced that I met the five USERRA conditions for reemployment as of 8/15/2022, when I made a timely application for reemployment at DWI. I left my DWI job in January 2022 to enter active duty, and I gave DWI prior oral and written notice. The way I figure it, I have not exceeded the five-year limit because several of my military periods are excluded from the computation of the limit. I served honorably and was released from active duty without having received a disqualifying bad discharge from the Army. Indeed, I was not discharged at all—just released from active duty.

DWI, through the company's personnel director and general counsel, has insisted that I am not entitled to reemployment because I have exceeded the five-year limit. What do you think?

A: You have not exceeded the five-year limit. Your five years of active duty, from May 1994 until May 1999, does not count because you performed that active duty before you began your DWI career in July 1999. The five-year limit is computed "with respect to the employer relationship for which a person seeks reemployment."⁵

Your drill weekends and annual training periods do not count toward exhausting your five-year limit with DWI.⁶ Your involuntary active-duty periods in 2003-04 and 2009-10 do not count

⁴ 38 U.S.C. § 4312(e)(1)(D).

⁵ 38 U.S.C. § 4312(c).

⁶ 38 U.S.C. § 4312(c)(3).

toward your five-year limit.⁷ Your voluntary active-duty periods in 2013-15 and 2020-22 count toward your five-year limit, but those periods add up to 54 months (4.5 years). You will have six months of headroom in your five-year limit at DWI.

Q: The DWI general counsel has insisted that, even if I am not beyond the five-year limit, and even if I meet all five of the USERRA conditions for reemployment, the company has the right to deny my application for reemployment because my repeated absences from work for military duty have put an “unreasonable burden” on the company. What do you say about that?

A: USERRA contains a provision that explicitly negates that argument:

In any determination of a person’s entitlement to protection under this chapter, the timing, frequency, and 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) [the five-year limit, with the nine exemptions] and the notice requirements subsection (a)(1) [prior notice to the employer] and the notification requirements established in subsection (e) [timely application for reemployment] are met.⁸

USERRA’s legislative history elaborates on the meaning and effect of section 4312(h) as follows:

Section 4312(i) [later renumbered as section 4312(h)] is a codification and amplification of the Supreme Court’s ruling in *King v. St. Vincent’s Hospital*, 112 S.Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under former section 2024(d) of title 38 [the former reemployment statute, replaced by USERRA in 1994]. This new section makes clear the Committee’s [House Committee on Veterans’ Affairs] intent that no “reasonableness” test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limits under section 4312(c) [the five-year limit] and the service member has complied with the requirements under section 4312(a) and (e) [prior notice to the employer and timely application for reemployment].⁹

⁷ 38 U.S.C. § 4312(c)(4)(a).

⁸ 38 U.S.C. § 4312(h).

⁹ H.R. Rep. No. 103-65, pt. 1 (1993), reprinted in KATHRYN PISCITELLI & EDWARD STILL, THE USERRA MANUAL: UNIFORMED SERVICES EMPLOYMENT & REEMPLOYMENT RIGHTS app. D-1, at 821 (2022 ed.).

Q: When I left my DWI job to report to active duty in January 2020, I recommended that the company promote my deputy, Mary Smith, to fill my position on an interim basis, until I returned from the Army. As I expected, Mary has done a great job, and the company is most reluctant to displace her to make room for me. The company insists that it is not required to reemploy me because that would necessarily mean displacing another employee who is doing a fine job. What do you say about that?

A: When you were released from active duty and met the five USERRA conditions, you were entitled to prompt reemployment in the appropriate position *even if that means that another employee must be laid off to make room for you*. In a case involving a Department of Veterans Affairs (VA) chaplain who sought reinstatement to the position of chief chaplain at a specific VA medical center, after returning from three years of active duty, the United States Court of Appeals for the Federal Circuit¹⁰ held:

The department [VA] first argues that, in this case, Nichols' [the returning veteran and plaintiff] former position was "unavailable" because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. "Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who "left private life to serve their country."

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946). *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable, and it is irrelevant that the department would be forced to displace Walsh to restore him.¹¹

¹⁰ 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 Merit Systems Protection Board (MSPB) decisions.

¹¹ *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1994). See also *Rivera-Melendez v. Pfizer Pharmaceutical LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013); *Ryan v. Rush-Presbyterian-St. Luke's Medical Center*, 15 F.3d 697 (7th Cir. 1994); *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communications Technologies, Inc.*, 460 F. Supp. 2d 700, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part and reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981); *Jennings v. Illinois Department of Education*, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978), judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Muscanere v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

Q: It has now been more than five months since I applied for reemployment at DWI, and the company has adamantly refused to reinstate me. I have been unable to find another job that pays anything close to what I was earning at DWI or what I earned on active duty.

The Army has contacted me—the organization where I was last on active duty, in 2020 to 2022, wants me to return to active duty for one year, so that I can participate in the recruiting, selecting, and training of my replacement. My concern is that if I voluntarily return to active duty for one year I will exceed the five-year limit with DWI, because I only have six months of headroom on the five-year limit. What do you say about this?

A: Under these circumstances, your new period of active service will not count toward your five-year limit with DWI. Under the Department of Labor (DOL) USERRA Regulations, “Service performed to mitigate economic harm where the employee’s employer is in violation of its employment or reemployment obligations to him or her” does not count toward the five-year limit.¹² I suggest that you send a certified letter to the DWI personnel director and general counsel. Tell them that you are returning to active duty to mitigate your damages—to reduce the back pay award that the company will owe you—and that you have not abandoned your demand that the company reemploy you.

Q: My active-duty pay, as an O-6, is a little bit less than what I was earning at DWI before I returned to active duty in January 2020. Moreover, the Army will not allow me to remain on active duty past May 2024, when I will have 30 years of commissioned service as an O-6. What do you say about that?

A: Returning to active duty for one year is only an interim measure. When you are released from active duty in early 2024, you need to make a new application for reemployment. If the company still refuses to reemploy you, you need to sue.

Q: How do I go about suing DWI?

A: There are two ways. First, you can file a formal, written USERRA complaint against the company with the Veterans’ Employment and Training Service of DOL (DOL-VETS), under section 4322(a) of USERRA.¹³ After DOL-VETS completes its investigation of your complaint, the agency will advise you of the results of the investigation.¹⁴ At that point, you can insist that DOL-VETS refer your case to the United States Department of Justice (DOJ).¹⁵ If DOJ is satisfied that you are entitled to the benefits you seek, it may take on your case and file suit on your

¹² 20 C.F.R. § 1002.103(b).

¹³ 38 U.S.C. § 4322(a).

¹⁴ 38 U.S.C. § 4322(e).

¹⁵ 38 U.S.C. § 4323(a).

behalf.¹⁶ If DOJ turns down your request for representation, or if you choose not to seek DOJ representation, you may file suit on your own behalf.¹⁷

Q: Where is the suit filed?

A: The suit may be filed in the United States District Court for any district where the private employer maintains place of business.¹⁸ Once filed, either by DOJ or by an attorney that you retain, a USERRA case proceeds to trial just like any other federal civil case, with the right of appeal, by either side, to the appropriate federal Court of Appeals and potentially (in rare instances) to the Supreme Court,

Q: If I proceed with private counsel and prevail, can I get the court to order the employer to pay my attorney fees?

A: Yes.¹⁹ But if you lose you will not be required to pay court costs or the attorney's fees of the defendant employer.²⁰

Q: Can I represent myself in a USERRA lawsuit against my employer?

A: Yes, but I do not recommend that you do that. Abraham Lincoln said: "A man who represents himself has a fool for a client."

Q: If we win, what relief is available?

A: USERRA provides:

In any action under this section, the court may award relief as follows:

- (A) The court may require the employer to comply with the provisions of this chapter.
- (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
- (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.²¹

¹⁶ 38 U.S.C. § 4323(a).

¹⁷ 38 U.S.C. § 4323(a).

¹⁸ 38 U.S.C. § 4323(c)(3).

¹⁹ 38 U.S.C. § 4323(h)(2).

²⁰ 38 U.S.C. § 4323(h)(1).

²¹ 38 U.S.C. § 4323(d)(1).

This means that the court will order the employer to comply with USERRA—if you were unlawfully denied reemployment, the court will order the employer to reemploy you. If you lost pay during the period between your application for reemployment (August 2022) and your eventual reemployment at the end of the case, the court will order the employer to pay you back pay, to compensate you for the loss, and if the court finds that the employer violated the law willfully the court will double the back pay award.

Q: How is back pay computed?

A: As I explained in Law Review 206 (December 2005), back pay should be computed on a pay period by pay period basis. For each pay period (probably either two weeks or half a month), the court should first determine what you would have earned from DWI if you had been promptly reemployed in August 2022. Then, the court should subtract from that figure the amount of money that you earned from the mitigating employment (if any) that you earned during that pay period. If you earned more from the mitigating employment during a specific pay period, you get no back pay for that pay period, but the excess is not applied to earlier or later pay periods.

The computation should be based on comparable hours. If you would have earned \$5,000 per pay period from DWI by working 40 hours per week but in a comparable pay period you earned \$6,000 for 60 hours of work, including 20 hours of overtime, the lawbreaking employer should not benefit from this extra work that you performed.²²

Do not compare what you earned from the mitigating employment with what you were earning at DWI at the time you left the job for military service in January 2020. Upon your reemployment, you were entitled to be paid at the rate of pay that you *would have been paid if you had remained continuously employed*, and that rate may be higher than what you were earning in January 2020.²³

Upon your proper reemployment in August 2022, you were entitled to seniority and pension credit for the time that you were away from work for service, as if you had been continuously employed.²⁴ If you will be returning to work at DWI, the court order should require the employer to adjust your seniority date and pension account accordingly. If you will not be returning to work, the court should award you cash sufficient to ensure that you do not lose out because of the employer's USERRA violation. The cash amount can be quite substantial.

Q: In September 2022, a month after I had applied for reemployment at DWI and had been denied, I contacted the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), and ESGR sent a volunteer ombudsman to meet with the personnel director of DWI. The personnel director threw the ombudsman out of her office,

²² See Law Review 18067.

²³ See Law Review 22016.

²⁴ 38 U.S.C. §§ 4316(a), 4318.

saying: “Silly Army laws like USERRA do not apply to me and to this company.” Does that statement indicate that DWI violated USERRA willfully?

A: Yes, that statement goes to show that the company knew that they should have reemployed you and willfully declined to do so based on the hubristic that they are above the law.

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, 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 provide 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,²⁵ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.²⁶ 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 join on-line at www.roa.org or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

²⁵ Congress recently created the United States Space Force as the 8th uniformed service.

²⁶ If you are under the age of 35, you can become an associate member for free for five years or when you turn 35, whichever comes first.

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²⁷ You can also contribute on-line at www.roa.org.