

You Can Bring Closely Related State Law Claims along with your Federal USERRA Claim in your Federal Court Lawsuit

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Subject Index Codes:

- 1.1.1.7—USERRA applies to State and local governments
- 1.1.3.3—USERRA applies to National Guard service
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Q: I am an attorney, and I have a client who is a Sergeant in the Army National Guard of this State. She was recently on State active duty for 30 days, and when she sought to return to her civilian job as a teacher for our local school district, she was denied reinstatement and effectively fired. I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does USERRA protect the civilian jobs of National Guard members when they are on State active duty?

A: Yes, but that has only been the case since 1/5/2021. On that date, the President signed into law the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement

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.

Act of 2020.³ Section 7004 of this new law amended section 4303(13) of USERRA,⁴ the definition of “service in the uniformed services,” by adding the following to the definition: “State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act,⁵ and State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.”⁶

Because your client performed a continuous period of State active duty that lasted 14 days or more after 1/5/2021, her civilian job is protected by USERRA. If your client met the five USERRA conditions for reemployment, she had the right to reemployment, and refusing to reinstate her promptly violated USERRA. You will need to prove that your client met the following conditions:

- a. She must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.⁷
- b. She must have given prior oral or written notice to the civilian employer.⁸
- c. Her cumulative period or periods of uniformed service, with respect to her employment relationship with that employer, must not have exceeded five years.⁹
- d. She must have been released from the period of service without having received a disqualifying bad discharge from the military.¹⁰
- e. After release from the period of service, she must have been timely in reporting back to work or applying for reemployment.¹¹

Q: In Law Review 22072 (November 2022), you wrote that when an individual sues a state government employer for violating USERRA the suit must be brought in state court, not federal court. The local school district that refused to reemploy my client after she completed

³ Public Law 116-315, 134 Stat. 4932.

⁴ 38 U.S.C. § 4303(13).

⁵ 50 U.S.C. § 1601 et seq.

⁶ 42 U.S.C. § 5170.

⁷ 38 U.S.C. § 4312(a).

⁸ 38 U.S.C. § 4312(a)(1). If giving prior notice was precluded by military necessity or otherwise impossible or unreasonable, your client was excused from the requirement to give prior notice. 38 U.S.C. § 4312(b).

⁹ 38 U.S.C. § 4312(c). Under that subsection, there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting an individual’s five-year limit with respect to an employer relationship. *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting an individual’s five-year limit.

¹⁰ 38 U.S.C. § 4304. Disqualifying bad conduct discharges include punitive discharges (awarded by court martial for serious offenses) and other-than-honorable administrative discharges.

¹¹ After a period of service that lasted fewer than 31 days (as in your client’s case), the service member is required to report to the employer “not later than the beginning of the first regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person’s residence.” 38 U.S.C. § 4312(e)(1)(A)(i).

her 30-day tour of state active duty is a political subdivision of the state. Must I bring this lawsuit in state court? Or can I file the lawsuit in federal court?

A: You can bring this lawsuit in the federal district court for the district court where the defendant maintains a place of business.¹² Section 4323 of USERRA provides for enforcement of USERRA against state and local governments and private employers. The final subsection of section 4323 provides: “In this section [for purposes of USERRA enforcement], the term ‘private employer’ includes a political subdivision of a State.”¹³ This means that your client can sue the school district (a political subdivision) in federal court, in her own name and with her own attorney, just like suing a private employer.

Q: In addition to her cause of action against the school district under USERRA, my client has several causes of action under state law. If I file suit for my client in federal court, will I be able to assert my client’s state law causes of action in the federal court lawsuit?

A: Yes. Federal law provides:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.¹⁴

Q: If I file suit for my client in federal court and prevail on the USERRA cause of action, what relief will the court award for my client?

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

¹² 38 U.S.C. § 4323(c)(2).

¹³ 38 U.S.C. § 4323(i).

¹⁴ 28 U.S.C. § 1367(a).

determines that the employer's failure to comply with the provisions of this chapter was willful.¹⁵

If your client also prevails on one of her state law claims, and if the state law provides for additional relief, she can receive additional relief under section 1367(a) (supplemental jurisdiction).

Q: What is the relationship between USERRA and state law? And what about the collective bargaining agreement between the school district and the teachers' union?

A: Under section 4302 of USERRA, this federal law is a floor and not a ceiling on the rights of those who serve or have served our country in uniform. State law and the collective bargaining agreement can give your client greater or additional rights but cannot take away your client's statutory rights under USERRA. Section 4302 provides:

- (a) Nothing in this chapter shall supersede, nullify, or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person under this chapter.
- (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.¹⁶

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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

¹⁵ 38 U.S.C. § 4323(d)(1).

¹⁶ 38 U.S.C. § 4302. In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

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,¹⁷ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.¹⁸ 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:

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¹⁷ Congress recently created the United States Space Force as the 8th uniformed service.

¹⁸ 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.

¹⁹ You can also contribute on-line at www.roa.org.