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Don't Try To Work at your Civilian Job while you Are on Active Duty—Part 4

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Subject Index Codes:
1.2—USERRA forbids discrimination
1.3.1.1—Left job for service and gave prior notice
1.8—Relationship between USERRA and other laws/policies

Q: I am a retired Air Force Reserve Colonel[3] and a life member of the Reserve Organization of America (ROA).[4] 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.

I seven years on active duty and 23 more years in the Air Force Reserve, before I retired in 2018. I have also spent a career (ongoing) as a pilot for a major airline—let us call it Very Big

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

[4] 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.

Air Line or VBAL. In 2020, I was promoted to the position of VBAL Chief Pilot. In my current position, I am responsible for administering the VBAL system of recruiting, hiring, training, and assigning pilots (Captains and First Officers) for all VBAL flights. This is an exceedingly difficult job, especially in the last few months, because our nation has a serious shortage of qualified airline pilots.

During my 23 years as a participating Air Force Reservist, I frequently read and relied upon your "Law Review" articles to help me understand my USERRA rights and responsibilities and to manage my dual careers—as an airline pilot and as an Air Force Reservist. Now that I am the Chief Pilot, I still read and rely upon your articles, but now the circumstances have been reversed. As the Chief Pilot, I must comply with USERRA, as well as other laws and the Federal Aviation Administration safety regulations and the collective bargaining agreement between the airline and the VBAL Pilots Association (VBALPA). USERRA sometimes limits our flexibility in ensuring that there are two highly qualified pilots in the cockpit for every scheduled flight, but my policy, and the company's policy, is that we must always comply with the law, including USERRA.

I have read and reread your Law Review 19016 (February 2019), titled "Don't Try To Work at your Civilian Job while you Are on Active Duty—Part 3." I have also read Part 2 (Law Review 18029, March 2018) and Part 1 (Law Review 106, December 2003). Also relevant is Law Review 13004 (January 2013), about *Drake v. Tuscan, Inc.,* 2010 U.S. Dist. LEXIS 2288 (District of Arizona January 12, 2010).

At VBAL, we have a pilot (let us call him "Joe Smith") who is a Major in the Air National Guard and who frequently exercises his USERRA rights, taking time off from his VBAL job for short and occasionally extended periods of military service or training. It has come to my attention recently that Joe Smith was on active duty for the entire month of July 2022, but he also flew all his scheduled flights with the airline that month. Smith never notified me or the airline that he would be on active duty for the entire month.

I have written up Smith on charges. We are considering disciplinary action against him, even firing him. What do you say about that?

Answer, bottom line up front:

I adhere to the *advice* that I have given in at least three of my published articles, that a reservist or National Guard member should not try to work at his or her civilian job while on military duty *but failing to follow Sam's advice is not a fireable offense.* You and VBAL do not have grounds to discipline Smith, much less to fire him.

Explanation

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, an individual must meet five simple conditions to have the right to reemployment in the civilian job after a period of absence from the job to perform uniformed service. [5] *Smith was not required to meet these conditions in July 2022 because he was never absent from work.* He flew every flight on his schedule during that month.

In Law Review 19016, I discussed a situation involving a National Guard noncommissioned officer who was simultaneously on full-time military duty as a recruiter and holding down a full-time municipal job. It is a mystery as to how he was able to pull this off for years—the recruiting position was not very demanding. When his military assignment required him to miss a day at his civilian job, he brought in a note signed by a more senior noncommissioned officer attesting to the "military necessity" that he absent himself from the civilian job on a specific day, and he demanded to be excused from his absence at the job on that day, citing USERRA.

In Law Review 19016, I wrote that the noncommissioned officer did not have the right to absent himself from his civilian job under those circumstances because he did not leave his job to perform uniformed service and then seek reemployment after release from the period of service. He was already on full-time military service before the day of absence, and he remained on full-time military service after the day of absence from the job.
Drake v. Tuscan, discussed in Law Review 13004, is also distinguishable. Charles W. Drake was an enlisted member of the Air Force (not Air Force Reserve or Air National Guard) and was stationed in Arizona. On 3/1/2008, he started "moonlighting" in a part-time job as a bouncer at a strip club. The Air Force deployed Drake to Qatar for 179 days, from June 2008 until February 2009. Drake returned to Arizona in February 2009, still on full-time active duty.

Smith's situation is entirely different. He did not seek, nor did he need, reemployment after or during his one-month period of active duty because he was never *absent from his civilian job* because of that active duty. During the month of July 2022, he was present for work for each scheduled assignment.

[5] The individual must have left his or her civilian job to perform service in the uniformed services and must have given the employer prior oral or written notice. The individual must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment, but there are nine kinds of service that do not count toward exhausting the five-year limit. *See* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit. The individual must have been released from the period of service and must have made a timely application for reemployment, after release.

If VBAL fires Smith or denies him a benefit of employment because of this allegation, that will amount to a violation of section 4311(a) of USERRA.[6] That subsection makes it unlawful for an employer (federal, state, local, or private sector) to deny a person "retention in employment" or any "benefit of employment" on the basis of "performance of service" in the uniformed services.

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,[7] you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership.[8] 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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[6] 38 U.S.C. § 4311(a).

[7] Congress recently created the United States Space Force as the 8th uniformed service.

[8] 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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https://www.foxnews.com/us/us-army-falls-25-percent-short-recruiting-goal

[9] You can also contribute on-line at www.roa.org.