

LAW REVIEW¹ 23032

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Recent USERRA Decision in the Northern District of Illinois

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

1.1.1.7—USERRA applies to state and local governments.

1.2—USERRA forbids discrimination.

1.4—USERRA enforcement

1.6—USERRA statute of limitations

1.8—Relationship between USERRA and other laws/policies

2.0—Paid leave for government employees who are Reserve Component personnel

Lara v. Rock Valley Police Department, 2023 U.S. Dist. LEXIS 36689, 2023 WL 2374979 (N.D. Ill. March 6, 2023).

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>.

Vincent Lara is an enlisted member of the United States Army Reserve (USAR). He sued the Rock Valley College³ Police Department in the United States District Court for the Northern District of Illinois, Western Division, in Rockford, Illinois. Lara is represented by Lieutenant Colonel John Norman Maher, USAR, a life member of the Reserve Organization of America (ROA).⁴ The case was assigned to Judge Philip G. Reinhard.

On the civilian side, Lara was employed as a police officer for Rock Valley College until he was constructively discharged.⁵ Sergeant Coe of the College's police department was initially Lara's second-level supervisor in the department, and Coe was also responsible for scheduling of the College's police officers.⁶ Coe strenuously objected to Lara's voluntary⁷ participation in the USAR and to the inconvenience that Lara's service placed on the department and Coe personally.

Coe claimed that Lara volunteered for extra Army Reserve details to "take advantage of the College's liberal military leave policy."⁸ Coe especially objected when Lara presented orders for

³ "Rock Valley College [RVC] is a public community college in Rockford, Illinois. It is part of the Illinois Community College System. RVC's district comprises Winnebago County, Boone County, and parts of Stephenson County, Ogle County, McHenry County, and DeKalb County." See https://en.wikipedia.org/wiki/Rock_Valley_College. Rock Valley College is a political subdivision of the State of Illinois. Political subdivisions do not have sovereign immunity under the 11th Amendment of the United States Constitution, and it is possible for a person claiming that his or her rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have been violated can sue a political subdivision in federal district court, in his or her own name and with his or her own lawyer, just like suing a private employer. See Law Review 23012 (March 2023).

⁴ In 2018, Reserve Officers Association members amended the organization's constitution to make enlisted service members, as well as officers, eligible for full membership, including voting and running for office. The organization adopted the doing-business-as name of Reserve Organization of America to emphasize that the organization represents all service members, without regard to rank.

⁵ The United States Equal Employment Opportunity Commission (EEOC) has defined the term "constructive discharge" as follows: "A constructive discharge occurs when an employee resigns from his/her employment because (s)he is being subjected to unlawful employment practices. If the resignation is directly related to the respondent's [employer's] unlawful employment practices, it is a foreseeable consequence of those practices and constitutes a constructive discharge. Commission Decision No. 72-2062, *CCH EEOC Decisions* (1973), P. 6366. Respondent is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party." *U.S. EEOC CM-612*, § 612.9(a).

⁶ There has been no trial in this case, nor has there been discovery. The facts stated in this article come from Lara's complaint, as summarized by Judge Reinhard's decision.

⁷ All military service in our country is essentially voluntary because half a century ago Congress abolished the draft and established the All-Volunteer Military (AVM). On 6/30/1973, the last involuntary conscript entered active duty. See Law Review 23002 (January 2023). That article is by First Lieutenant Tara C. Buckles, USMCR. Without a law like USERRA, and without effective enforcement of that law, it would not be possible for the armed forces to recruit enough qualified volunteers to make the AVM work. See Law Review 14080 (July 2014).

⁸ Rock Valley College has a policy of paying its employees for workdays missed to perform training or service in the Reserve or National Guard. USERRA is a floor and not a ceiling on the employment and reemployment rights of service members and veterans—an employer can always do more than USERRA requires, but the fact that an employer does more than USERRA requires in one area does not authorize the employer to do less than USERRA requires in other areas. The Department of Labor (DOL) USERRA Regulation states: "If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided

him to attend the “Army Ten-Miler” event in our nation’s capital.⁹ Because of Coe’s strenuous objection, Lara asked the Army to rescind the orders for the “Army Ten-Miler,” and the Army complied with his request.

Although Lara withdrew his request for military leave for the Army Ten-Miler, Coe conducted what he characterized as an informal investigation into Coe’s view that Lara had “manipulated the College’s liberal military leave policy.” Coe accused Lara of presenting a “fictitious” military order,¹⁰ falsifying leave, attendance, and military leave records, threatening Lara’s sworn military law enforcement career with a criminal investigation, arrest, and prosecution. Trying to end the discrimination based on Army Reserve service and avoid a criminal investigation and arrest (fatal to a sworn law enforcement officer’s ability to secure future law enforcement employment), Lara was effectively forced to resign and thus was constructively discharged.

Coe was not satisfied by Lara’s resignation from the department, and Coe referred his informal investigation to detectives in the Winnebago County Sheriff’s Office. The detectives accepted Coe’s allegations without any independent investigation and arrested Lara for alleged fraud. Lara was forced to spend one night in jail and then spent the next two years defending against the criminal prosecution. He was precluded from obtaining law enforcement work, and he incurred large legal fees. The resulting financial uncertainties put strains on his marriage and family.

After almost two years, the county prosecutors withdrew the charges. Lara sought and secured an expungement, which was entered into the court’s record.

In his opinion, dismissing Lara’s original complaint for failure to state a claim, Judge Reinhard firmly rejected the contention that initiating criminal proceedings against an employee and threatening arrest and prosecution against a law enforcement employee as a reprisal for the employee having exercised USERRA rights amounts to a violation of section 4311 of USERRA.¹¹ In his opinion, Judge Reinhard wrote:

by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.” 20 C.F.R. § 1002.7(d).

⁹⁹ This is an official event, and many Army Reserve, Army National Guard, and Regular Army soldiers attend the event on orders. This annual event promotes physical fitness among soldiers and also helps the Army to recruit new soldiers in the next generation.

¹⁰ Coe apparently meant to say “fictitious.” The Army later reviewed all the orders that Lara had submitted to the College and determined that they were all genuine Army orders for necessary military training.

¹¹ 38 U.S.C. § 4311. That section forbids discrimination in employment, including initial employment, retention of employment, and benefits of employment on the basis of an employee’s or applicant’s membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform future service.

Given that USERRA requires an adverse employment action for an actionable claim and that, as just discussed, a criminal prosecution is not an adverse employment action because it does not involve plaintiff's job conditions, a claim based on malicious prosecution is not actionable under USERRA.

Judge Reinhard dismissed Lara's lawsuit without prejudice. This means that Lara had the opportunity to rewrite the complaint and refile the lawsuit, and Lara has done just that. We will keep the readers informed of developments in this interesting and important case.

Q: Did Judge Reinhard correctly rule that initiating a criminal prosecution in bad faith, in order to discourage an employee from exercising his or her USERRA rights, does not violate USERRA?

A: In my opinion, no.

Section 4311(b) of USERRA provides:

An employer may not discriminate in employment against or take any *adverse employment action* against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter.. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.¹²

Section 4311(b) makes it unlawful for an employer to take an "adverse employment action" (like firing or demotion) against an employee for having exercised USERRA rights. I do not agree with Judge Reinhard's holding that an investigation, even if initiated in bad faith and for improper reasons, is not an "adverse employment action."

I have found a case involving an Army Reservist who was also a local police officer and who alleged that his supervisors and his employer (the Police Department of the City of Suffolk) had initiated an Internal Affairs Division (IAD) investigation of the employee as a reprisal for his having exercised his USERRA rights. The defendants (the City of Suffolk and the supervisors) filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, claiming that an investigation cannot be an "adverse employment action" for purposes of section

¹² 38 U.S.C. § 4311(b) (emphasis supplied).

4311(b) of USERRA. Judge Rebecca Beach Smith of the United States District Court for the Eastern District of Virginia rejected that argument, holding:

The facts pleaded also support a claim under Section 4311(b). Plaintiff alleges that the investigation conducted by Internal Affairs, which may be construed as "an adverse employment action" within the scope of Section 4311(b), was conducted as a result of plaintiff's meeting with Dodson at which plaintiff attempted to request accommodation for his military service. On its face, the complaint states that the investigation is pretextual and that it was instigated by plaintiff's enforcement of his federal rights. An investigation of the sort plaintiff pleads constitutes retaliatory action within the scope of the statute such that this court can grant relief.¹³

Nonetheless, I favor an amendment to USERRA to remove doubt from this question. I have proposed that Congress amend section 4311(b) by adding "or other adverse action" after "adverse employment action." We will keep the readers informed of developments on this front.

Q: Why didn't Lara's lawyer cite section 1983 of title 42 in challenging the lawfulness of the bad-faith criminal prosecution?

A: Section 1983 would have been an excellent section to cite, but unfortunately Lara waited too long to seek legal advice. By the time Lara retained an attorney, the statute of limitations under section 1983 had expired.

Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.¹⁴

¹³ *Brandasse v. City of Suffolk, Virginia*, 72 F. Supp. 2d 608, 615 (E.D. Va. 1999).

¹⁴ 42 U.S.C. § 1983 (emphasis supplied).

Q: Time out! In more than one article you have written that USERRA does not have a statute of limitations and that it precludes the application of other statutes of limitations. What gives?

A: Here is the pertinent subsection of USERRA:

If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA] *alleging a violation of this chapter*, there shall be no limit on the period for filing the complaint or claim.¹⁵

Section 4327(b) does not apply to Lara's cause of action under section 1983.

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. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 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 advocate for the rights and interests of service members and 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.

¹⁵ 38 U.S.C. § 4327(b) (emphasis supplied). There is no deadline on filing a USERRA lawsuit, but this preclusion of statutes of limitations does not apply to other causes of action that a service member or veteran may have. This is not to say that I recommend sleeping on your rights. The longer you wait, the more difficult it is to prove your case.

If you are now serving or have ever served in any one of our nation's eight¹⁶ 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
1 Constitution Ave. NE
Washington, DC 20002¹⁷

¹⁶ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁷ You can also contribute on-line at www.roa.org.

UPDATE—SEPTEMBER 2023

After the District Judge dismissed his complaint, with leave to refile, plaintiff Vincent Lara, through his attorney John Maher, redrafted the complaint and refiled the case. The defendant, Rock Valley Community College, has again moved to dismiss the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Here is a link to John Maher's brief, opposing the motion to dismiss.

If the District Judge again grants the defendant's motion to dismiss, Lara will appeal to the United States Court of Appeals for the 7th Circuit, the intermediate federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. ROA will likely support Lara in the appellate court by filing an *amicus curiae* ("friend of the court") brief supporting his appeal.

We will keep the readers informed of developments in this interesting and important case.