

LAW REVIEW¹ 25030

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An Entry-Level Separation Does Not Disqualify the Person from the Right to Reemployment.

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

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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 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.e>

Q: I am the mayor of a small city—only 15,000 residents. A young man (let us call him Joe Smith) grew up in our city and graduated from high school four years ago. Shortly after graduating, he joined the city staff as a sanitation truck driver. Four years later, he resigned to join the Army, the Regular Army, not the Army Reserve or the Army National Guard. Just before he left town to report to basic training, I took him and his parents to dinner at a nice restaurant, to honor him for his decision to serve our country in the armed forces.

During the dinner, I asked him if he wanted military leave and whether he expected to return to the city government employment after his service. He told me unambiguously that he was not requesting military leave and that he intended to remain on active duty for a full career of 20 years or more. Just four months later, he came home. I asked to see his discharge certificate, and he showed me a document called an “entry-level separation.” What is entry-level separation?

A: An enlisted service member (not a commissioned officer) who is released from one of the armed forces during the first 180 days of service *for whatever reason* receives an “uncharacterized” discharge or entry-level separation (ELS), under a Department of Defense (DOD) policy adopted in 1982. The fact that Joe Smith received an ELS does not necessarily mean that he did something wrong. For example, it is possible that there is a medical disqualification that was missed during the examination at the Military Entrance & Processing Station that became evident during basic training.

Q: Can a person who received an ELS have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: Yes. Joe Smith has the right to reemployment with the city government if he meets the five USERRA conditions for reemployment. The ELS does not disqualify him from the right to reemployment.

Q: What are the five USERRA conditions?

A: As I have explained in detail in Law Review 24047 (October 2024), Joe Smith or any returning service member or veteran has the right to reemployment in the pre-service job if he or she meets five simple conditions:

- a. He or she must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services as defined by USERRA. Joe Smith did this.
- b. He or she must have given the employer prior oral or written notice that he or she was leaving the job to perform uniformed service. Joe Smith told you and others in the city government leadership that he was resigning his job to join the Army.
- c. His or her cumulative period of uniformed service, relating to the employer relationship for which he or she seeks reemployment, must not have exceeded five years. Joe Smith has four years and eight months of “headroom” in his five-year limit with respect to the city, but it is most unlikely that he will again serve in the armed forces.

- d. He or she must not have received one of the disqualifying bad discharges enumerated in section 4304 of USERRA.³
- e. He or she must have made a timely application for reemployment after release or discharge from the period of uniformed service. After a period of service of more than 30 days but less than 181 days, the person must apply for reemployment within 14 days after the release from service.⁴

Q: What kind of discharge disqualifies a person from the right to return to his or her pre-service employer?

A: In a “USERRA Fact Sheet” the Veterans’ Employment & Training Service of the United States Department of Labor (DOL-VETS) has stated:

- 8. Does USERRA require any particular type of discharge for entitlement to rights and benefits? •

USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, they will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee have not received one of these types of discharges. 38 U.S.C. § 4304; 20 C.F.R. § 1002.134.

- 9. What types of characterizations of service or discharges are disqualifying under USERRA? •

³ 38 U.S.C. § 4304.

⁴ 38 U.S.C. § 4312(e)(1)(C).

A person's entitlement to the rights and benefits of USERRA is terminated if the person is: (1) separated from uniformed service with a dishonorable or bad conduct discharge; (2) separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service; (3) a commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court martial; or, in time of war, by order of the President; or, (4) a commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution. 10 U.S.C. § 1161(a)-(b); 38 U.S.C. § 4304; 20 C.F.R. § 1002.135.⁵

An ELS is not one of the enumerated disqualifying bad discharges. If Joe Smith meets the five USERRA conditions, and it seems clear that he does, the city is required to reemploy him.

Q: Joe Smith was released from the Army on 8/1/2025, as shown on the Army document that he showed me. Ten days later, on 8/11/2025, he visited me in my office. He reminded me that he had left his city job to join the Army, and he told me that he was back home from the Army and wanted to return to his city job. Was that a proper and timely application for reemployment?

A: Yes. To qualify as a proper application for reemployment, all he needed to say was that he was a former employee returning from

⁵ <https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-Fact-Sheet-3-Separations.odf>.

uniformed service and seeking to return to his pre-service job. His communication to you in your office amounted to a proper application for reemployment.⁶ Because he made that application for reemployment within 14 days after the Army released him, and because he met the other four USERRA conditions, the city is required to reemploy him.

Q: When Joe Smith met with me before he left to join the Army, he did not request a military leave of absence, and he told me that he would be on active duty for a full career of 20 years or more and that he would not be returning to work for the city under any circumstances. Does that defeat his right to reemployment?

A: No. Joe Smith was not required to request a military leave of absence or to ask for or receive your permission to join the Army. He was only required to tell you that he was leaving his job to perform uniformed service, and he did that. His statement that he would remain on active duty for 20 years or more and that he would never seek to return to the city staff does not defeat his right to reemployment. His right to return to work for the city after release from the Army is an unburned bridge that he has the right to walk back across, without regard to what he may have said or intended before or during his period of uniformed service.⁷

Q: Our small city only needs nine sanitation truck drivers. When Joe Smith left his city job months ago, we hired Mary Jones to take his place, and she is doing an excellent job. We cannot afford to pay ten

⁶ See 20 C.F.R. § 1002.118. This is one of the sections of the DOL-VETS USERRA Regulations.

⁷ See 20 C.F.R. § 1002.88. See also Law Review 17112 (November 2017).

sanitation truck drivers, and I am most reluctant to displace Mary Jones to make room for Joe to return. What gives?

A: Because Joe Smith meets the five USERRA conditions, the city must reemploy him promptly *even if that means displacing another employee.*⁸

Q: What kind of job is Joe Smith entitled to upon reemployment?

A: The city must reemploy Joe in the position of employment that he would have attained if he had remained continuously employed by the city during the entire time that he was away from work for uniformed service or in another position, for which he is qualified, that is of like seniority, status, and pay.⁹ Upon his reemployment, you must treat Joe *as if he had remained continuously employed by the city during the entire time that he was away from work for his Army service.*¹⁰

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This article is one of 2,300-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 the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve

⁸ See Law Review 25011 (March 2025). In that article, I cite a long series of court decisions and other authorities showing that the returning veteran who meets the five USERRA conditions is entitled to prompt reemployment even if that means that another employee must be displaced.

⁹ 38 U.S.C. § 4313(a)(2)(A).

¹⁰ See Law Review 25011 (March 2025).

32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).¹¹

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. General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War” invited junior officers who had served under him to attend the meeting. Captain Harry S. Truman was one of those junior officers. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide 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, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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,

¹¹ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002¹⁴

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

¹³ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

¹⁴ You can also contribute on-line at www.roa.org.