

LAW REVIEW¹ 25042

November 2025

Is it Unlawful for a Federal Agency To Fire me for Exceeding the Five-Year Limit? Yes, but that Does Not Mean that you Will Have the Right to Reemployment after 18 Continuous Years of Active Duty.

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

1.3.1.2—Character and duration of service.

Q: I am a Captain (O-6) in the Navy³, and I found your Law Review 22056 (September 2022) while doing Internet research about my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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>.

³ This article is based on a real inquiry that I have received. I have changed several of the facts to disguise the identity of the individual who contacted me.

Some months ago, I filed a USERRA complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). In your Law Review 22056, you wrote that it is illegal for a federal agency to fire an employee for being absent from his or her federal civilian job, even if the period of active military service exceeds five years. That is exactly what happened to me. I provided the DOL-VETS investigator with a copy of your Law Review 22056, saying that your article is all the evidence that I need to prove that my USERRA rights were violated.

The DOL-VETS investigator, let us call her Mary Jones, said: "Sam Wright is wrong. It is not illegal for a federal agency, or any civilian employer, to fire an employee who has been away from his or her job for military service for more than five years." What do you say about that?

Factual background

I graduated from college in 1998 and was commissioned an Ensign (O-1) upon graduation, via the Naval Reserve Officers Training Corps (NROTC). I served on active duty for exactly five years, until I was released from active duty in May 2003. I immediately affiliated with the Navy Reserve (USNR) and started training regularly as a part-time Navy Reserve officer. I began a federal civilian job shortly after I left active duty.

In February 2007, during the Iraq Surge, I was recalled to active duty by the USNR, for two years, until February 2009. I gave prior notice to my civilian supervisor and to the personnel office of the federal agency where I worked. The agency put me on "military leave" and I remained on that "military leave" status until September 2024, when the federal agency "terminated my employment" over my strenuous

objection. I made a timely complaint to DOL-VETS that my USERRA rights had been violated.

In February 2009, the other members of my USNR unit were released from active duty after two years of involuntary emergency service. I was offered the opportunity to leave active duty at that time, but I chose to remain on active duty and I am still on active duty in 2025. I am now eligible to retire from the Navy with more than 20 years of active duty, but I am not required to retire until May 2028, when I attain 30 years of commissioned service. I will likely retire on 9/30/2026, at the end of Fiscal Year 2026.

I expect to leave active duty by retirement at the end of the current fiscal year and to apply for reemployment in October 2026 with the federal agency that I left in February 2007, when I was recalled to active duty from part-time USNR service. I figure that I am still on “military leave” until I resign or until the federal agency fires me, and it is unlawful for the agency to fire me for exceeding the five-year limit, as you wrote in Law Review 22056. Thus, I have the right to return to work for the federal agency that I worked for in February 2007 and pick up where I left off with that agency. Am I wrong?

Answer, bottom line up front:

Yes, you are wrong. Regardless of how your status is characterized during the time that you are away from your civilian job for military service, you have the right to reemployment upon leaving active duty *only if you meet the five USERRA conditions for reemployment.* The five-year limit is one of the five essential conditions. You exceeded the five-year limit in February 2014, five years after you decided to remain on active duty voluntarily after you completed the two-year involuntary call-up for emergency service.

Explanation

USERRA's five conditions for reemployment

Like any service member or veteran, you are entitled to reemployment only if you meet the five USERRA conditions:⁴

- a. 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.⁵
- b. Must have given the employer prior oral or written notice.⁶
- c. Must not have exceeded the five-year cumulative limit on the duration of the person's period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.⁷
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.⁸
- e. After release from the period of service, must have made a timely application for reemployment.⁹

You met the first two conditions in February 2007, when you were called to active duty. It is very likely that you will meet the fourth condition when you leave active duty by retirement later this fiscal

⁴ See generally Law Review 15116 (December 2015).

⁵ See 38 U.S.C. § 4312(a).

⁶ See 38 U.S.C. § 4312(a)(1).

⁷ See 38 U.S.C. § 4312(c). As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. See generally Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count toward exhausting an individual's five-year limit with respect to an employer relationship.

⁸ See 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious misconduct, as well as "other than honorable" administrative discharges.

⁹ After a period of service of 181 days or more, the person has 90 days to apply for reemployment. See 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

year, and you can certainly meet the final condition by making a timely application for reemployment within 90 days after you leave active duty. But at this point you do not meet and cannot meet the third condition. You have exceeded the five-year limit.

Your two years of involuntary active duty, from February 2007 until February 2009, are exempt from the computation of your five-year limit.¹⁰ Your five-year clock started running in February 2009, and that alarm clock went off in February 2014. You do not have the right to reemployment because you fail to meet the third of the five USERRA conditions.

Q: The fact remains that you wrote in Law Review 22056 that it is unlawful for a federal agency to fire an employee for exceeding the five-year limit. Do you adhere to what you wrote in September 2022?

A: Yes, I adhere to what I wrote in Law Review 22056. The five-year limit is an eligibility criterion for reemployment. Serving on active duty, even beyond the five-year limit, is not misconduct that would justify firing you. If the agency fires you while you are on active duty, that is a violation of section 4311 of USERRA.¹¹

The way that I see it, and apparently the way that DOL-VETS saw it, is that the federal agency did not fire you in September 2024. Rather, the agency “administratively terminated” your employment so that it could fill the long-vacant position. I have seen the SF-50 form that the agency gave you in September 2024. *The form expressly states that the termination is non-disciplinary.*

I have seen circumstances where federal agencies “fired” employees for exceeding the five-year limit, and that effectively made it impossible for the individual to return to federal civil service employment after

¹⁰ See 38 U.S.C. § 4312(c)(4)(A).

¹¹ 38 U.S.C. § 4311.

leaving active duty. In your case, the *non-disciplinary termination* will not have that effect.¹²

Q: In Law Review 25006 (February 2025), Colonel George C. Aucoin wrote that Congress recently amended USERRA's statement of purpose. Formerly, the purpose was to "encourage noncareer service in the uniformed services." Now, the purpose is to "encourage service in the uniformed services." The word "noncareer" was deleted. Does this mean that a person like me, with 18 years of continuous active duty away from a civilian job, can have the right to reemployment?

A: No, it does not mean that. We (the Reserve Organization of America) drafted and advocated for the recent USERRA amendments, as outlined in Law Review 25006. We are very pleased that the word "noncareer" has been deleted from USERRA's statement of purpose, *but the five-year limit has not been repealed.*

As I have discussed in detail in Law Review 16043 (May 2016), there are nine generous exceptions to the five-year limit. I have spoken to Reserve Component service members who have been away from their civilian jobs for more than a decade, without losing the right to reemployment, because most of their active duty service was exempt from the five-year limit under section 4312(c) of USERRA. But in your case, your voluntary active duty after February 2009 is not exempt. You exceeded the five-year limit in February 2014. We cannot turn back the hands of time to change that fact.

¹² The usual way of getting a federal civilian job is through the USAJOBS website operated by the United States Office of Personnel Management (OPM). An attractive opportunity may attract scores of applicants. The federal agency reviews the applications and invites perhaps five applicants to come in for interviews. If an applicant's record shows that he or she was previously fired by a federal agency for misconduct, the applicant probably will not be invited in for an interview. I am confident that the SF-50 that you received will not have that adverse effect for you.

Please join or support ROA.

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 (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).¹³

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 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

¹³ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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

If you are now serving or have ever served in any one of our nation's eight¹⁴ uniformed services, you are eligible for membership in ROA,¹⁵ 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.¹⁶ If you are eligible for ROA membership, please join. You can join on-line at <https://www.roa.org/page/memberoptions> 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

¹⁴ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁵ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

¹⁶ Under a recent amendment to the ROA Constitution, ancestors and lineal descendants of past or present members of the armed forces of the United States are also eligible to join ROA.

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