

LAW REVIEW¹ 21035

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Am I Required To Participate in my Civilian Employer's Investigation while I Am Deployed?

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Q: I am a Specialist-4 (E-4) in the Army Reserve and a member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about 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 2000 "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 Spouse 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 1800 of the articles.

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 worked 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 SWright@roa.org.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name:

I have been recalled to active duty, with my Army Reserve unit, and I am currently serving at a classified location in Asia. I am concerned that the owner of the company where I work—let us call him Vidkun Quisling—will try to figure out a way to deny me reemployment or to fire me shortly after I return from my year of active duty. Mr. Quisling has always given me a hard time about my Army Reserve service and my absences from work that my service has necessitated, although those absences have all been clearly protected by USERRA.

In September 2020, shortly before I left my job to report to active duty, there was an accident at work. No one was seriously injured, but a valuable machine was damaged beyond repair. Mr. Quisling brought in an engineer to investigate the accident. It seems to me that he is trying to use the accident as a pretense or excuse to fire me.

The engineer sent a certified letter to my home, where my wife received it, and she is concerned. The letter included a lengthy questionnaire about what led up to the accident, and apparently several employees who were at work at the time of the accident received the same questionnaire.

My wife called Mr. Quisling and told him that I am serving overseas at a classified location and that I am unable to receive and complete the questionnaire at this time. Mr. Quisling told her: “I don’t want to listen to any excuses. If we do not have your husband’s completed questionnaire within ten days, he will be fired.”

Does it violate USERRA for my civilian employer to send me a questionnaire like this while I am away from work on active duty? Do I have a legal obligation to complete and return the questionnaire? What do you suggest that I do or have my wife do?

A: I suggest that you get your wife to send a certified letter to Mr. Quisling, explaining again that you are unable to participate in the investigation at this time because you are serving our country on active duty at a classified location overseas. She should enclose a copy of our Law Review 134, which was published in 2004. The title of that article is “Employers: Please Do Not Bother them in Iraq.”

Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

Your wife should also contact the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR). The telephone number is 800-336-4590. ESGR can send a volunteer ombudsman to talk to Mr. Quisling and appeal to him to get off your back.

As I have explained in Law Review 15116 (December 2015), you will be entitled to prompt reemployment in your pre-service job if you meet five simple conditions:

- a. You must have left the job to perform uniformed service.⁴ You already meet that condition.
- b. You must have given the employer prior oral or written notice.⁵ which you did.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.⁶ Your current period of involuntary active duty does not count toward that limit.⁷
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military, like a bad conduct discharge or an OTH (other than honorable) administrative discharge.⁸
- e. After release from the period of service, you must have made a timely application for reemployment. After a period of service of 181 days or more, you have 90 days to apply for reemployment.⁹ Shorter deadlines apply after shorter periods of service.

If you meet these five conditions, you are entitled to prompt reemployment.¹⁰ It is unlawful for your employer to add a sixth condition—that you participated in the investigation during the time that you were away from work for service.¹¹

Q: What is to keep Mr. Quisling from reemploying me and then firing me a few days later?

A: You are protected by section 4316(c) of USERRA. That section provides:

(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause--
(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

⁴ 38 U.S.C. 4312(a).

⁵ 38 U.S.C. 4312(a)(1).

⁶ 38 U.S.C. 4312(c).

⁷ 38 U.S.C. 4312(c)(4)(A). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count toward exhausting the five-year limit.

⁸ 38 U.S.C. 4304.

⁹ 38 U.S.C. 4312(e)(1)(D).

¹⁰ 20 C.F.R. 1002.180. “‘Prompt reemployment’ means as soon as practicable under the circumstances. Absent unusual circumstances, reemployment must occur within two weeks of the employee’s application for reemployment.” 20 C.F.R. 1002.181.

¹¹ See *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008).

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.¹²

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue rewrite and update of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. From the beginning, the federal reemployment statute has had a "special protection against discharge" provision, because Congress has always recognized that employers will be tempted to make a mockery of the reemployment obligation by reinstating the returning veteran only to fire him or her shortly thereafter. USERRA made a small change in the calculation of the duration of the special protection period but did not change the underlying concept. USERRA's legislative history provides as follows concerning section 4316(c):

Section 4315(d) [later renumbered as 4316(c)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. Under current law [the VRRA] there is a one-year period of special protection against discharge without cause after return from active duty and six months protection after return from initial active duty for training. There is no explicit protection [under the VRRA] for employees returning from active duty for training or inactive duty training regardless of length. Under this provision, the protection [period] would begin only upon proper and complete reinstatement. *See O'Mara v. Peterson Sand & Gravel Co.*, 498 F.2d 896, 898 (7th Cir. 1974).

The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement.

As expressed in *Carter v. United States*, 407 F.2d 1238, 1244 (D.C. Cir. 1968), "cause" must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice, expressed or fairly implied, that such conduct would be cause for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario*, 796 F. Supp. 166, 172 (E.D. Pa. 1992).

The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v. Louisville & Nashville Railroad Co.*, 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the "escalator" principle would have eliminated a person's job or placed that person on layoff in the normal course.¹³

¹² 38 U.S.C. 4316(c). This refers to section 4316(c) of title 38 of the United States Code.

¹³ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (part 1), reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The three quoted paragraphs can be found on pages 817-18 of the 2020 edition of the *Manual*.

As I have explained in Law Review 17068 (June 2017), *The USERRA Manual* by Kathryn Piscitelli and Edward Still is the definitive reference on USERRA. In their book, they devote 11 pages to section 4316(c).¹⁴

Q: Mr. Quisling has said many times that we are in an “at-will” state and that I am an “at-will” employee, meaning that he can fire me for any reason or no reason. What do you say about that?

A: In their book, Ms. Piscitelli and Mr. Still write:

Section 4316(c) of USERRA protects from discharge without just cause employees who are reemployed after returning from a period of military service lasting more than 30 days. In so doing, the statute [USERRA] converts the otherwise at-will employment status of the employee during the discharge-protected period.¹⁵

In our country, the great majority of private sector employees are “at-will” employees. You are an at-will employee unless you have a collective bargaining agreement (negotiated by your union and the employer) that limits firings to just cause. Today, unions represent only a tiny percentage of the private sector workforce.

If you are an at-will employee, you can be fired for any reason or no reason *but not a reason that a specific federal or state statute proscribes as a basis for making employment decisions*. A century ago, the at-will doctrine was much more meaningful than it is today, because many federal and later state laws have been enacted in the last century that forbid discrimination on the basis of certain characteristics or activities. The federal reemployment statute (originally enacted in 1940) is one of those statutes. A statute that did not apply to at-will employees would be an essentially worthless statute.

Q: What happens if Mr. Quisling reinstates me to my job and then waits a year and a day before firing me?

A: In that case, section 4311 of USERRA comes into play. That section reads as follows:

Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment*, promotion, or any

¹⁴ *The USERRA Manual*, 2020 edition, section 6:6, pages 262-272.

¹⁵ *Id.*, at page 262.

benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) 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.

(c) An employer shall be considered to have engaged in actions prohibited--

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.¹⁶

Please see Law Review 17016 (March 2017). In that article, Thomas Jarrard and I discuss section 4311 in detail.

Please join or support ROA

This article is one of 2000-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. New articles are added each month.

ROA is almost a century old—it was established in 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 many

¹⁶ 38 U.S.C. 4311 (emphasis supplied).

decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights 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 seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. 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:

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