

LAW REVIEW¹ 21046

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USERRA's Furlough or Leave of Absence Clause Is Not Just for Airline Pilots.

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[About Sam Wright](#)

1.3.2.10—Furlough or leave of absence clause

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel (O-5) in the Army Reserve and a life member of the Reserve Organization of America (ROA).³ On the civilian side, I work for a large multi-national corporation, let us call it Daddy Warbucks Industries or DWI. I have read with great interest

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2200 "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 2000 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 44 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 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new "doing business as" name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I am particularly interested in your four recent articles about USERRA’s “furlough or leave of absence” clause. Law Review 21014 deals with United Air Lines (UAL) pilots. Law Review 21015 deals with Southwest Airlines (SWA) pilots.⁴ Law Review 21016 deals with FedEx pilots. And Law Review 21017 deals with American Airlines (AA) pilots.

Does this principle only apply to airline and cargo carrier pilots? How does this principle apply to me as a DWI employee?

DWI grants *paid* leave to employees who are called for jury service. Does that mean that the company must give me *paid* military leave for my drill weekends and two-week annual training tours?

A: This principle is by no means limited to pilots. At the end of this article, you will find a link to an article about a class-action lawsuit against Walmart on this issue. Unlike UAL, SWA, FedEx, and AA, Walmart magnanimously agreed to settle, changing its policy, and paying back pay to approximately 10,000 current and former employees.

Q: What is the underlying legal principle?

A: USERRA’s “furlough or leave of absence” clause reads as follows:

(1) Subject to paragraphs (2) through (6) [not applicable here], a person who is absent from a position of employment by reason of service in the uniformed services shall be—
(A) deemed to be on furlough or leave of absence while performing such service; and
(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.⁵

ROA has argued, in two amicus curiae (friend of the court) briefs in two separate federal appellate courts, that this clause means that if an employer grants *paid* leave for non-military reasons (like jury duty) it must also grant *paid* military leave for a comparable period of absence

⁴ The case discussed in Law Review 21015 applies to all affected SWA employees, not just pilots.

⁵ 38 U.S.C. 4316(b)(1).

from work for military training or service.⁶ The United States Court of Appeals for the 7th Circuit⁷ has unambiguously accepted and endorsed this ROA position.⁸

The FedEx case began in the United States District Court for the Eastern District of Pennsylvania, and that court granted FedEx's motion to dismiss.⁹ Travers (the plaintiff) appealed to the United States Court of Appeals for the 3rd Circuit.¹⁰ The district court decision in *Travers* is similar to the decision of the United States District Court for the Northern District of Illinois that the 7th Circuit reversed in *White*, and ROA filed an amicus brief in the 3rd Circuit that was similar to the brief it filed in the 7th Circuit. The 3rd Circuit has held oral argument, and it is likely that the decision will be released sometime this year.

It is likely that the 3rd Circuit will follow the 7th Circuit precedent in *White*. If the 3rd Circuit rejects that precedent, there will then be a conflict among the circuits. and it is likely that the Supreme Court will grant certiorari (discretionary review) to resolve the conflict.

The AA case also began in the Eastern District of Pennsylvania, but before a different judge. This judge denied AA's motion to dismiss.¹¹ AA appealed to the 3rd Circuit, and the district judge put the case on hold pending the 3rd Circuit decision. If (as I expect) the 3rd Circuit follows *White* and rules favorably in *Travers*, the 3rd Circuit will likely reverse the district court decision in *Scanlan* and remand the case to the district court for reconsideration under the new *Travers* precedent.

The case against SWA, discussed in Law Review 21015, was filed in the United States District Court for the Northern District of California. That case is just getting started. California is in the 9th Circuit, the federal appellate court that sits in San Francisco and hears appeals from district courts in many western states. It is likely that the Northern District of California and the 9th Circuit will follow the 7th Circuit and 3rd Circuit precedents.

We will keep the readers informed of developments in these four cases and other "furlough or leave of absence" clause cases.

⁶ The period of absence from work must be of comparable duration. It is not reasonable to compare a five-year military leave to a five-day jury leave.

⁷ The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

⁸ See *White v. United Air Lines*, 987 F.3d 616 (7th Cir. 2021). Since this panel decision was released on 2/3/2021, the 7th Circuit has denied UAL's request for rehearing and rehearing en banc. This is now a final decision of the 7th Circuit. UAL's only remaining appellate option is to apply to the Supreme Court for certiorari (discretionary review), and that is a long shot. *White* is one of the two cases where ROA filed an amicus brief.

⁹ See *Travers v. FedEx Corp.*, 437 F. Supp. 3rd 421 (E.D. Pa. 2020).

¹⁰ The 3rd Circuit is the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the United States Virgin Islands.

¹¹ See *Scanlan v. American Airlines Group*, 384 F. Supp. 3d 520 (E.D. Pa. 2019).

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This article is one of 2200-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 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, 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, 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 eight¹² 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:

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1 Constitution Ave. NE
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<https://www.askthelawyers.com/walmart-settles-userra-violation-claims-regarding-short-term-military-leave-policy>

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