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DOL-VETS and DOJ Do well for Army Reservist

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[About Sam Wright](#)

1.2—USERRA forbids discrimination

1.3.2.12—Special protection against discharge except for cause

1.4—USERRA enforcement

Lieutenant Colonel Louis Rego, United States Army Reserve (USAR), was a pharmacist for Maimonides Medical Center in Brooklyn, New York until he was “laid off” on 11/21/2017. He complained to the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), asserting that the employer’s decision to dismiss him from his employment violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).

DOL-VETS investigated his complaint and found it to have merit. At Rego’s request, DOL-VETS referred the case file to the United States Department of Justice (DOJ). DOJ agreed that Rego’s complaint was valid and filed suit on his behalf, against Maimonides, in the United States District Court for the Eastern District of New York. On 5/3/2021, the employer settled the lawsuit under terms that are very favorable to Colonel Rego. At the bottom of this article, you will find a copy of the DOJ press release announcing the settlement.

Colonel Rego was on full-time USAR duty for 75 days, from 7/17/2017 until 9/30/2017. He met the five conditions for reemployment under USERRA. He left his civilian job to perform service in the uniformed services, and he gave the employer prior oral or written notice. He served

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,200 “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), 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 published so far, but we are always looking for “other than Sam” articles by other lawyers who are ROA members or willing to join ROA.

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 and retired as a Captain (O-6) in 2007. I am a life member of ROA and have served on the national staff as the Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC during its six years in operation as a funded ROA program. I have continued some of the work of the SMLC as a volunteer and ROA member since I left the national staff in 2015.

honorably and did not receive a disqualifying bad discharge from the Army. Indeed, he was not discharged at all—he was simply released from active duty and returned to his part-time USAR status. This 75-day period of service did not put him over the five-year cumulative limit on the duration of his periods of uniformed service relating to his employer relationship with Maimonides.³ After his release from duty on 9/30/2017, he made a timely application for reemployment at Maimonides.⁴

Rego returned to work on 10/2/2017, just two days after he was released from the period of service, but he was “laid off” just 50 days later, on 11/21/2017. This appears to have been a sham layoff. There were more than 100 pharmacists in Rego’s group at Maimonides, but he was the only one dismissed. Maimonides hired other pharmacists shortly before and shortly after it fired Rego.

Under section 4316(c) of USERRA,⁵ a person who has returned to a civilian job after a period of service of more than 30 days but less than 181 days, and who meets the five USERRA eligibility criteria, must not be discharged from such employment, except for cause, within 180 days after the return to work.⁶ Because Rego’s 180-day special protection period had not expired by the time the employer dismissed him, the dismissal was unlawful unless the employer could *prove* (not just say) that the dismissal was for cause.⁷

Selecting Colonel Rego for this “layoff” also violated section 4311 of USERRA.⁸ That section makes it unlawful for an employer (Federal, State, local, or private sector) to deny a person retention in employment (among other things) on the basis of the person’s membership in a uniformed service, application to join a uniformed service, performance of service (currently, recently, or in the distant past), or application or obligation to perform service. If the plaintiff

³ Under section 4312(c) of USERRA, 38 U.S.C. 4312(c), there is a five-year cumulative limit on the duration of the individual’s periods of uniformed service relating to his or her relationship with that employer, and there are also nine exemptions—kinds of service that do not count toward exhausting the individual’s five-year limit. 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.

⁴ After a period of service of more than 30 days but less than 181 days, the service member or veteran has 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C).

⁵ 38 U.S.C. 4316(c).

⁶ If the period of service lasted for 181 days or more, the special protection period would last for one year. The purpose of the special protection period is to protect the returning service member or veteran from a bad-faith or pro forma reinstatement and to give the service member or veteran a reasonable time to get back up to speed in the civilian job. Please see Law Review 09011 (February 2009).

⁷ Cause could be misconduct, or it could be the operation of a system of seniority. If this had been a bona fide layoff based on poor business conditions and a reduced need for the services of pharmacists, and if Maimonides had in place a seniority system whereby layoffs were based on seniority, and if Rego’s seniority had been such that he would have been laid off anyway without regard to his USAR service, the layoff under those circumstances would not be unlawful, but those were not the circumstances of Rego’s case.

⁸ 38 U.S.C. 4311. Please see Law Review 17016 (March 2017), by attorney Thomas Jarrard and me, about the text and legislative history of section 4311 and the case law under that section.

proves that one of these protected factors was *a motivating factor* (not necessarily the sole reason) in the employer's decision to dismiss the employee, the dismissal is unlawful unless the employer can *prove* (not just say) that it would have dismissed the employee anyway, without regard to the protected factor.

In this case, the *proximity in time* between Rego's absence from work for USAR service and the termination of his employment goes a long way toward proving that the employer's decision to fire him was motivated, at least in part, by his USAR service. The employer's transparent ruse that the firing was a layoff also helps to prove Rego's case.

There has been no finding that Maimonides violated Federal law—the company settled the case before it proceeded to trial. But the DOJ description of the facts makes it sound like Colonel Rego had a strong case. Moreover, defendants do not ordinarily pay \$195,000 to settle a case unless they reasonably fear losing the case at trial.

In articles like Law Review 11081 (October 2011) and Law Review 07058 (November 2007), I have been critical of DOL-VETS for doing shoddy USERRA investigations and for being too anxious to accept at face value the legal and factual assertions of employers and their attorneys. Please note that I have also praised DOL-VETS and DOJ when they have done well.⁹

This article belongs in the “favorable” category. I congratulate DOL-VETS and DOJ for their excellent work on behalf of Lieutenant Colonel Louis Rego, USAR.

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ROA is almost a century old. It was established in October 1922 by a group of veterans of “The Great War” (as World War I was then known). Captain Harry S. Truman was one of those veterans. 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 defense. 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 military organization that exclusively supports America’s Reserve and National Guard.

⁹ Please see Law Reviews 19040 (April 2019), 19039 (March 2019), 17081 (August 2017), 13126 (September 2013), 13031 (February 2013), 12069 (July 2012), 12040 (April 2012), 12032 (March 2012), and 12030 (March 2012).

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs in the Supreme Court and other courts, we educate service members, attorneys, judges, employers, and others about the legal rights of service members and 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 cost 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 eight¹⁰ uniformed services, you are eligible for full ROA membership, including the right to vote and run for office in the organization. Eligibility includes those who are serving or have served in the Active Component, the Reserve, or the National Guard, and enlisted members as well as officers are eligible. If you are eligible, please join on-line at www.roa.org or call ROA at 800-809-9448. The cost is only \$20 per year, or \$450 for a life membership.

If you are not eligible, please support us financially to help us continue this work. You can mail us a check as follows:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Here is the DOJ press release about the Rego case:

Maimonides Medical Center in Brooklyn Agrees to Settle Claims of Employment Discrimination by U.S. Army Reservist

([STL.News](#)) Mark J. Lesko, Acting United States Attorney for the Eastern District of New York, announced today a settlement with Maimonides Medical Center (Maimonides) in Brooklyn to resolve a lawsuit filed on behalf of Lieutenant Colonel Louis Rego, a U.S. Army Reservist and former Maimonides pharmacist. Maimonides is the largest hospital in Brooklyn and is an affiliate of Northwell Health, New York State’s largest health care provider and private employer. According to the United States’ complaint, Maimonides violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) by terminating Lieutenant Colonel Rego’s employment in the Pharmacy Department after he was called up to active military duty status. USERRA prohibits discrimination in employment based on an individual’s prior service in the uniformed services; current

¹⁰ Congress recently established the United States Space Force as the eighth uniformed service.

service in the uniformed services; or intent to join the uniformed services. Under the terms of the settlement, Maimonides will pay Lieutenant Colonel Rego \$195,000 to compensate him for lost wages and other damages. The settlement also requires Maimonides to provide annual training to hospital officials and human resources staff on the rights of service members under USERRA.

“Lieutenant Colonel Rego’s honorable service to his country cost him his job as a pharmacist, even though USERRA flatly prohibits employers from discriminating against employees on account of their military service,” stated Acting U.S. Attorney Lesko. “This Office is firmly committed to enforcing USERRA’s requirements and to holding employers like Maimonides accountable for their failure to comply.”

Rego was ordered to full-time active duty with the U.S. Army Reserves on July 17, 2017, when he was deployed for a tour of duty with U.S. Army Medical Materiel Agency at Fort Detrick in Maryland. Rego took a leave of absence from Maimonides in order to perform his military service. Rego returned to work at MMC on October 2, 2017. Just seven weeks later, on November 21, 2017, Rego was informed by a supervisor that his position was being eliminated and that he was being terminated as part of a reduction in force designed to save money at the hospital. Rego was the only employee terminated of the more than 100 employees in the Pharmacy Department. After Rego was fired, Maimonides promoted and gave pay raises to two mid-level managers in order to cover some of Rego’s duties, used non-managers to perform other duties and paid those non-managers overtime. Maimonides also hired new Pharmacy Department employees immediately before and after it fired Rego and had posted an opening for his job on a job search website one week before he was dismissed.

The claims resolved by the settlement are allegations only; there has been no determination of liability and Maimonides denies that it has violated USERRA.

The case is being handled by Assistant U.S. Attorney Sean P. Greene-Delgado of the Office’s Civil Division.

SOURCE: [USDOJ.Today](#)