

LAW REVIEW¹ 21054

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How Do I Get Free DOJ Representation for my USERRA Case?

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[About Sam Wright](#)

1.1.2.5—USERRA applies to executive employees

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

Q: I am a Lieutenant Colonel³ in the Army Reserve and a life member of the Reserve Organization of America (ROA).⁴ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁵ I am particularly interested in Law Review 21053, the immediately preceding article in this series.

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.

³ The factual set-up for this article is based on several inquiries that I have received over the years. These facts should not be attributed to any one individual.

⁴ At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

⁵ Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

For more than 15 years, I have worked for a major corporation—let us call it Daddy Warbucks Industries or DWI, and I have worked my way up to a mid-level executive position.⁶ Over the years, I have received considerable static from my DWI supervisors about my periods of absence from work necessitated by my USAR training and service, although those absences were clearly protected by USERRA. When I have encountered problems, I have called upon the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR)⁷ and those problems have been resolved, but I think that it is fair to say that I have risen this far in DWI in spite of, not because of, my Army Reserve service.

Recently, a DWI executive, one step above me in the corporate ladder, retired and a promotion opportunity arose. I was one of 20 applicants for this promotion opportunity and one of five finalists who were interviewed by a panel of five senior DWI executives. None of the five panel members has ever served our country in uniform.⁸ Among the five finalists for the promotion, I was the only veteran.

During my hour-long interview, three of the five panel members asked me pointed questions about my USAR service—how much time I need to be away from work, is it possible that I will be mobilized or will volunteer, etc. Near the end of the interview, the panel chairman asked: “If we select you for this promotion, will you retire from the Army Reserve?” I declined to answer that question.

I think that I was the most qualified among the five finalists for the promotion. I think that I was denied the promotion because of my Army Reserve service. What do you think?

In Law Review 21053 you wrote that Lieutenant Colonel Louis Rego, USAR got free legal representation from the United States Department of Justice (DOJ). How can I get free DOJ representation?

A: I will divide my answer into two parts. First, I will address the substantive question of whether denying you the promotion violated USERRA. Second, I will address the procedural question of how you might get free DOJ representation.

Denying you a promotion because of your uniformed service violates USERRA.

⁶ Yes, USERRA applies to executive employees, all the way up to the president of the company. The pertinent section of the Department of Labor (DOL) USERRA regulation states: “USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.” 20 C.F.R. 1002.43. *See also* Law Review 07004 (January 2007).

⁷ Both employers and Reserve Component personnel can call ESGR at 800-336-4590 or contact ESGR at www.esgr.mil for information and assistance about USERRA.

⁸ It has now been almost half a century since Congress abolished the draft and established the All-Volunteer Military in 1973. More and more each year, those who are in positions of authority in the private sector and in government have never served in uniform.

The pertinent USERRA provision is section 4311.⁹ That section makes it unlawful for an employer (Federal, State, local, or private sector) to deny a person a promotion (among other things) because 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 proves that one of these protected factors was *a motivating factor* (not necessarily the sole reason) in the employer's decision to deny the person a promotion, the denial is unlawful unless the employer can *prove* (not just say) that it would have denied the promotion anyway, without regard to the protected factor.

The fact that panel members questioned you about your military service and obligations during the interview sufficiently proves that your Army Reserve service was *a motivating factor* in the panel's decision to promote somebody else instead of you.¹⁰ I think that the evidence about the interview is sufficient, in and of itself, to make your *prima facie* case that the company violated USERRA when it denied you the promotion. You can buttress your case by proving instances when DWI supervisors have given you static about your Army Reserve service.

You can make your *prima facie* case, meaning that the burden of proof will shift to DWI. To prevail, the company will need to *prove* (not just say) that you were denied the promotion for a lawful reason unrelated to your military service. For example, the company can try to prove that Mary Jones, the person selected for the promotion, was better qualified than you in ways that are unrelated to the fact that she is not a uniformed service member.

How to get free DOJ representation

To get free DOJ representation in your lawsuit against DWI, you first need to file a formal written USERRA complaint against the company with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).¹¹ That agency will investigate your complaint and, upon completing the investigation, will advise you of the results.¹² At that point, you can request (in effect insist) that DOL-VETS refer the case file to DOJ.¹³ If DOJ agrees

⁹ 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.

¹⁰ See *Horneman v. Department of Veterans Affairs*, No. DE-4324-15-0102-1-1 (Merit Systems Protection Board March 4, 2016). I discuss that case in detail in Law Review 16014 (March 2016). If your Army Reserve service had been irrelevant to the selection process, the panel members would not have asked you about your service during the interview.

¹¹ 38 U.S.C. 4322.

¹² 38 U.S.C. 4322(a).

¹³ 38 U.S.C. 4322(a)(1).

that your USERRA rights were violated, it may file suit on your behalf against DWI in the appropriate Federal district court.¹⁴

Q: How long does this process take?

A: DOL-VETS is required to complete the investigation within 90 days after receiving your formal, written USERRA complaint.¹⁵ After DOL-VETS completes its investigation and advises you of the results, and after you have requested referral to DOJ, DOL-VETS must refer the case file to DOJ within 60 days.¹⁶ Within 60 days after receiving the referral from DOL-VETS, DOJ must decide whether it will represent you and notify you of the decision.¹⁷

Congress added these deadlines by amending USERRA in 2008. DOL-VETS and DOJ do not always meet these deadlines, but there has been some improvement on the timeliness front.

Of course, once the suit is filed it can take years to get to trial because of crowded court dockets and the need for an often contentious and lengthy discovery process before trial.¹⁸

Q: If DOL-VETS finds “no merit,” can I nonetheless insist that DOL-VETS refer my case to DOJ for consideration of representation?

A: Yes, but that is probably a waste of time. It is exceedingly rare for DOJ to provide representation in a case that came from DOL-VETS with a negative recommendation. It is hard enough to get DOJ to take cases that come from DOL-VETS with positive recommendations.

Q: If DOJ turns down my request for representation, can I retain a private lawyer and sue?

A: Yes. When you receive the DOJ letter informing you that DOJ has declined your request for representation, you can retain a lawyer and sue the company in the appropriate Federal district court.¹⁹ Alternatively, when DOL-VETS informs you of the results of its investigation, you can at that point retain private counsel and sue, instead of requesting referral to DOJ.²⁰ You can also

¹⁴ 38 U.S.C. 4323(a)(1).

¹⁵ 38 U.S.C. 4322(f).

¹⁶ 38 U.S.C. 4323(a)(1).

¹⁷ 38 U.S.C. 4323(a)(2).

¹⁸ Getting a trial date is not any faster if you have private counsel rather than DOJ. I invite the reader’s attention to Act III, Scene 1 of *Hamlet*, by William Shakespeare. This is the famous “to be or not to be” soliloquy. While contemplating suicide, Prince Hamlet sets forth a litany of all that is wrong with human life, and “the law’s delays” is one item in a very long list. That problem has only gotten worse in the 418 years since Shakespeare wrote that play.

¹⁹ 38 U.S.C. 4323(a)(3)(C).

²⁰ 38 U.S.C. 4323(a)(3)(B).

bypass DOL-VETS altogether and file suit in Federal district court with private counsel you retain.²¹

Q: If I retain private counsel and sue, will DWI be able to introduce evidence that DOL-VETS found my case to have no merit or that DOJ turned down my request for representation?

A: No. Evidence about the action by DOL-VETS and DOJ is inadmissible and will not be considered, either for you or against you. I am aware of several cases where DOL-VETS found “no merit” and a private lawyer took the case and won.²²

Q: If I proceed with private counsel and win, can the court order the employer (DWI) to pay my attorney fees?

A: Yes.²³

Q: Can I act as my own lawyer in suing DWI?

A: Yes, but I strongly advise against that course of action. Abraham Lincoln said: “A man who represents himself has a fool for a client.” And the law is much more complicated today than it was during Lincoln’s lifetime.

Q: A lawyer that I consulted told me that before I can sue a company like DWI I must first file a formal written complaint with the United States Equal Employment Opportunity Commission (EEOC) and get a “right-to-sue” letter from that agency. Is that correct?

A: No, that lawyer is confused. The requirement to get a right-to-sue letter from the EEOC applies to cases under Title VII,²⁴ the Americans with Disabilities Act,²⁵ the Age Discrimination in Employment Act,²⁶ and other laws that are under the cognizance of the EEOC. The EEOC has no role in enforcing USERRA. You do not need a right-to-sue letter to sue an employer for violating USERRA.

Q: In a case like mine, am I better off to rely on DOL-VETS and DOJ, or would it be better to retain private counsel?

²¹ 38 U.S.C. 4323(a)(3)(A).

²² See, e.g., Law Review 07058 (November 2007).

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²⁴ Title VII of the Civil Rights Act of 1964 forbids discrimination in employment based on race, color, sex, religion, or national origin. Title VII is codified at 42 U.S.C. 2000e et seq.

²⁵ 42 U.S.C. 12101 et seq.

²⁶ 29 U.S.C. 621-634.

A: 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.²⁷

As an executive employee of a major corporation, you can afford to retain private counsel, and I think that would be money well spent. You need an *advocate*, not a neutral third party like DOL-VETS and DOJ.

In a case like yours, if the company promptly receives a well-written demand letter from a lawyer, the company may well come to its senses and comply with USERRA by promoting you to the position you sought or another comparable available position. If you wait for DOL-VETS and DOJ, it will be at least seven months before such a demand letter can be sent.²⁸

Another big advantage of retaining competent private counsel is that he or she can consider many laws and legal theories, not just USERRA. If you rely on DOL-VETS and DOJ, only USERRA will be considered.

Q: I contacted five lawyers in my hometown, all lawyers who advertise themselves as employment lawyers on the plaintiff's side. None of them seemed to know much about USERRA. Whom do you recommend that I contact?

A: My first two choices would be Thomas Jarrard (an attorney in Spokane, Washington) and Brian Lawler (an attorney in San Diego, California). Both are recently retired Marine Corps Reserve officers and life members of ROA. Both have nationwide USERRA practices and have had great successes. Both have written several of our published "Law Review" articles at www.roa.org/lawcenter.

Please join or support ROA

This article is one of 2,200-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 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

²⁷ Please see Law Reviews 21054 (September 2021), 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).

²⁸ The seven months represents three months for DOL-VETS to complete its investigation, two months for DOL-VETS to refer the case to DOJ, and two months for DOJ to decide what to do with the referral.

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.

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 eight²⁹ 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

²⁹ Congress recently established the United States Space Force as the eighth uniformed service.