

## Does USERRA Apply to ROTC and JROTC?

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will jobs

1.1.2.4—Students

1.1.3.2—USERRA applies to regular military service

1.2—USERRA forbids discrimination

1.7—USERRA regulations

**Q: I am a retired Army Reserve Colonel<sup>3</sup> and a life member of the Reserve Organization of America (ROA).<sup>4</sup> I have read with great interest many of your “Law Review” articles about the**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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 (VRRRA—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 VRRRA 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 VRRRA 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](mailto:SWright@roa.org).

<sup>3</sup> The factual set-up for this article is hypothetical but realistic.

<sup>4</sup> 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

**Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.**

**My military days are long over, but I can recall instances when knowledge of these laws would have been very helpful to me in balancing my Army Reserve obligations with my obligations to my civilian employer, but my interest in these laws today is based primarily on my interest in my two grandchildren. I have a grandson who is an undergraduate at a major private university and a member of the Naval Reserve Officers Training Corps (NROTC) and a granddaughter who is a student at our local public high school and who is a member of the Army Junior ROTC (JROTC).**

**My grandson applied for a part-time job at his university's library, but he was turned down. The university's head librarian has been at the campus continuously for 52 years, since the fall of 1969, when he came as a freshman. During his undergraduate days, the head librarian was a draft-resister and an adamant opponent of the Vietnam War. He hated the United States military then and he still does today. He was heard saying something to the effect that he would not permit any member of the university's NROTC unit to work at the library. Did denying my grandson the library job based on his membership in the NROTC unit violate USERRA?**

**A:** Bottom line up front, yes, discriminating against your grandson in hiring for a part-time student job at the university library violated section 4311 of USERRA, which provides:

**(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 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 [USERRA], (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—

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organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

(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.*<sup>5</sup>

Section 4331 of USERRA<sup>6</sup> gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to State and local governments and private employers. DOL promulgated such regulations in 2005, and they are codified in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The pertinent section is as follows:

### **Does USERRA cover a member of the Reserve Officers Training Corps?**

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Yes, under certain conditions.

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not "service in the uniformed services." However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may at times, while participating in that program, be receiving active duty and inactive duty training service credit with their unit. In these cases, participating in ROTC training sessions is considered "service in the uniformed services," and qualifies a person for protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. *Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is*

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<sup>5</sup> 38 U.S.C. 4311 (emphasis supplied). Please see Law Review 17016 (March 2017) for a detailed discussion of the Supreme Court and Court of Appeals caselaw under section 4311.

<sup>6</sup> 38 U.S.C. 4331.

*protected under USERRA's anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.*<sup>7</sup>

Thus, the university librarian's decision not to hire your grandson *because of his membership in the NROTC unit and his obligation to perform uniformed service after graduation* violates section 4311 of USERRA, quoted in its entirety above.

**Q: My grandson complained to the university's President, and he referred the matter to the university's General Counsel (GC). The GC said that USERRA does not apply to "temporary" or "part-time" jobs, and that a student job on campus is, by definition, temporary and part-time. What do you say about that?**

**A:** The GC is wrong. The pertinent section of the DOL USERRA Regulations is as follows:

**Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**

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USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.<sup>8</sup>

I also invite your attention to the final subsection of section 4311, italicized in the quotation of that section above.

**Q: As I have said, my granddaughter is in high school and is a member of the Junior Reserve Officers Training Corps (JROTC). Does USERRA apply to JROTC?**

**A:** No. JROTC is a citizenship program, not a commissioning program. The high school students in JROTC have no obligation to enlist in the military after they graduate, and most of them never enlist. USERRA does not apply to JROTC students or to JROTC instructors.

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<sup>7</sup> 20 F.R. 1002.61 (bold question in original, emphasis by italics supplied).

<sup>8</sup> 20 C.F.R. 1002.41 (bold question in original).

## **Please join or support ROA**

This article is one of 2200-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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.

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, DOL investigators, ESGR volunteers, congressional and state legislative 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 seven 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](http://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:

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