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It Is Unlawful for an Employer To Discriminate against those who Have Served in the Military regarding Civilian Pension Entitlements.

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.7—USERRA applies to State and local governments
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Q: I am a Colonel in the Army National Guard (ARNG)[3] and a life member of the Reserve Organization of America (ROA).[4] I have read with great interest many of your "Law Review"

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[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] The factual set-up for this article is based on an amalgamation of several Reserve Component members that I have hear from. These facts should not be attributed to any one person.

[4] 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

articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have a question about how USERRA applies to me.

I was born in 1969. In 1991, I graduated from college. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC), and I was commissioned a Second Lieutenant in the ARNG upon graduation. In 1992, I attended my city's Police Academy and became a police officer. I worked in that capacity, in addition to my part-time service in the ARNG, until 2004, when I was involuntarily called to active duty with my ARNG unit and deployed to Iraq. The unit was released from active duty 18 months later, but I chose to remain on active duty under title 32 of the United States Code.[5] I am still on title 32 duty, serving at the headquarters of the National Guard of my State. I will leave active duty by retirement next year.

I recognize that I am not entitled to civilian pension credit for my active-duty time because I do not meet the five conditions for reemployment, as you discussed in Law Review 15116 (December 2015). Specifically, I am beyond the five-year limit imposed by section 4312(c) of USERRA.[6] My first 18 months of involuntary service, starting in 2004, are exempt, but the rest of my service, after my ARNG unit was released from active duty in 2006, is not exempt. I have read and reread your Law Review 16043 (May 2016).

Nonetheless, I earned a modest police department pension based on my 12 years as a police officer, from 1992 to 2004. Under my police department's pension plan, a police officer earns a monthly pension check, payable starting on his or her 50th birthday, with ten years of police service. In 2019, when I was approaching my 50th birthday, I contacted the police department's personnel department to inquire about my eligibility for the police pension. The police department "terminated my employment" (fired me) for "failure to report back to work in a timely manner as required by USERRA."

The police department then awarded me a modest pension starting on my 50th birthday, *but there is no cost-of-living adjustment (COLA)* on the pension. The police department told me that if I had voluntarily resigned in 2004, I would have earned an annual COLA on my pension, but since I was terminated there is no COLA, under their policy.

In my 1992 police academy class, I had a classmate whom I will call "Joe Smith." Joe became a police officer with me in 1992, and he served until 2004, when he resigned. He served honorably, but after 12 years he decided to get into another line of work. I met up with him recently. He is a car salesman at a local dealership.

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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.

[5] Title 32 governs the National Guard.

[6] 38 U.S.C. 4312(c).

Joe started receiving monthly police department pension checks on his 50th birthday, *and he receives an annual COLA.* Why is Joe treated better than I am treated? The only relevant difference is that he voluntarily resigned, and I was "terminated."

I think that treating me worse than Joe Smith is unfair and possibly illegal. What do you think?

A: I think that the police department and the city are violating 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.
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> **(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.
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> **(c)** An employer shall be considered to have engaged in actions prohibited—
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> **(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
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> **(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.[7]

USERRA's legislative history addresses section 4311 as follows:

> Current law[8] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment, (*See Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. *The definition of employee, which includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.*[9]

The police department deprived you of *retention of employment* when it terminated your employment (fired you) in 2019. Moreover, the police department deprived you of an important *benefit of employment* (the right to annual cost-of-living adjustments to your pension benefit) *because of your performance of uniformed service.*

The five-year limit (with its nine exemptions) is *an eligibility criterion for reemployment. Performing active-duty service, even beyond the five-year limit, is not misconduct that justifies firing an employee.* The police department violated section 4311 when it terminated your employment in 2019.

You were not entitled to reemployment in 2019 because you were already beyond the five-year limit and because you had not been released from active duty. You will not be entitled to reemployment when you finally leave active-duty next year, even if you apply for reemployment at that time, because you are beyond the five-year limit. Nonetheless, it is

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[7] 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.

[8] "Current law" refers to the Veterans' Reemployment Rights Act (VRRA), the 1940 reemployment statute

[9] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part I), 1994 U.S.C.C.A.N. 2449, 1993 WL 235763 (Legislative History) (emphasis supplied). This report is published in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on pages 805-06 of the 2021 edition of the *Manual.*

unlawful for the police department, your former employer, to discriminate against you based on your performance of uniformed service. Denying you the annual COLA on your pension, while giving the COLA to other former employees like Joe Smith, violates section 4311.

In at least one relevant way, your case resembles an important Federal Circuit[10] decision.[11] Sergeant Major Erickson, ARNG, was away from his United States Postal Service (USPS) job when the employer fired him for "excessive use of military leave" in March 2000. Erickson remained on active duty until 12/31/2005. When he finally left active duty at the end of 2005, Erickson did not have the right to reemployment because he was beyond the five-year limit and because he failed to make a timely application for reemployment in the first 90 days of 2006.[12] Nonetheless, firing Erickson in March 2000 violated USERRA.

The USPS argued: "We did not fire Erickson because of his performance of uniformed service. We fired him because of his absence from work." The MSPB accepted this ludicrous argument. The Federal Circuit firmly rejected this nonsensical distinction, as follows:

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating on the basis of absence when the absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.[13]

Erickson was not entitled to reemployment in 2006, but the March 2000 firing harmed him because it made it impossible for him to find another USPS job or a job in any Federal executive agency.[14] Similarly, you are not entitled to reemployment, but the police department's decision to terminate your employment in 2019 harms you because it means that you do not get a cost-of-living adjustment on your police pension. In both cases, the termination violated section 4311 of USERRA.

Q: As you suggested, I made a formal, written USERRA complaint against the city and the police department and filed that complaint with the Veterans' Employment and Training

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[10] The United States Court of Appeals for the Federal Circuit is the specialized Federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from decisions of the Merit Systems Protection Board (MSPB). The MSPB, a quasi-judicial Federal executive agency, adjudicates claims that Federal executive agencies, as employers, have violated USERRA. *See* 38 U.S.C. 4324.

[11] *Erickson v. United States Postal Service,* 571 F.3d 1364 (Fed. Cir. 2009).

[12] After a period of service of 181 days or more, the returning service member or veteran must apply for reemployment within 90 days after the date of release from service. *See* 38 U.S.C. 4312(e)(1)(D).

[13] *Erickson,* 571 F.3d at 1368.

[14] Whenever Erickson applies for a Federal civilian job using USAJOBS, the Federal job selection tool operated by the United States Office of Personnel Management (OPM), the record (available to hiring agencies) shows that he was fired by the USPS in March 2000. Thus, he never gets to second base in his effort to find a Federal job.

Service of the United States Department of Labor (DOL-VETS), in accordance with section 4322 of USERRA.[15] A DOL-VETS employee investigated my complaint and then advised me, in writing, that he had determined that my complaint had "no merit." Where do I go from here?

A: The DOL-VETS employees who investigate USERRA complaints are not lawyers, and they get precious little help from DOL lawyers. The DOL-VETS investigator did not even consider the legal theory that I am setting forth in this article. I suggest that you contact the national headquarters of DOL-VETS and ask them to reopen your case. You can send them a copy of this article.

Q: What happens if DOL-VETS refuses to reopen my case or if they reopen the case and then reaffirm the "no merit" determination?

A: In that case, you can retain private counsel and sue the city in the United States District Court for the district that includes the city.[16]

Q: If I sue the city, will it be able to point to the DOL-VETS "no merit" determination?

A: No. The DOL-VETS determination of "merit" or "no merit" is inadmissible and will not be considered either for you or against you. The court will make its own determination about the facts and the law.

Q: If I retain private counsel to sue the city and I win, can I get the court to order the city to pay my attorney fees?

A: Yes.[17]

Please join or support ROA

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

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[15] 38 U.S.C. 4322.
[16] *See* 38 U.S.C. 4323(a)(3), 4323(c).
[17] *See* 38 U.S.C. 4323(h)(2).

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 or call ROA at 800-809-9448.

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