

**LAW REVIEW<sup>1</sup> 21080**

**December 2021**

**Your Employer Violated USERRA Willfully, But under Current Law  
You Are Not Entitled to Monetary Damages.  
USERRA Needs To Be Amended.**

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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 2300 "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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

<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 45 years, I have collaborated 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](mailto:SWright@roa.org).

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**Q: I am a Major in the Virginia Army National Guard<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 Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>5</sup> and other laws that are especially pertinent to those of us who serve in the National Guard or Reserve. I have shared the link to your articles with many of my National Guard colleagues. I recently became a life member of your fine organization because you do a great job of informing us and advocating for us concerning our legal rights with respect to our civilian employers.**

**I live and work in the Northern Virginia suburbs of our nation’s capital. From 2010 until recently, I worked for a major Federal contractor—let us call it Beltway Bandits Are Us or BBRU. At this outfit and similar “beltway bandit” outfits, employees are hired to work on specific contracts with Federal agencies. Many of those contracts get renewed repeatedly and last for a decade or more, but when a contract ends and is not renewed the BBRU employees working on that contract need to find other new or ongoing BBRU contracts with Federal agencies and transition to other contracts. A BBRU employee in this situation can receive BBRU pay on “company overhead” for up to 60 days, at which point the employee goes into an unpaid status until he or she finds another BBRU opportunity.**

**Between 2010, when I was hired, and 2017, I worked on a series of short-term BBRU contracts with Federal agencies. I had a few short periods without pay when I was between assignments, but I was always able to find a new assignment reasonably quickly and I was earning good money. In 2017, I was one of 100 BBRU employees assigned to a new, major BBRU contract with the United States Department of the Interior (DOI). The three-year BBRU**

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<sup>3</sup> This article is based on a real situation, but I have changed many of the facts to hide the individual’s identity and to make some important legal points.

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

<sup>5</sup> As I have explained in detail in footnote 2 and Law Review 15067 (August 2015), 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. You can find USERRA in title 38 of the United States Code (U.S.C.), at sections 4301 through 4335 (38 U.S.C. §§ 4301-35).

contract with DOI was renewed in 2020 for another three years, and that contract will likely continue to be renewed until 2029 or longer.

In 2019, I volunteered<sup>6</sup> to go on active duty under title 32<sup>7</sup> of the United States Code at the Office of the Adjutant General of my State. My active-duty period was for Fiscal Year 2020, from 10/1/2019 until 9/30/2020. I read and reread your Law Review 15116 (December 2015) about the five USERRA conditions, and I carefully met and documented that I met all five conditions. I left my job in late September 2019 to go on active duty, and I gave BBRU and DOI more than a month of advance oral and written notice. This year of active duty did not put me over my five-year cumulative limit with respect to my employer relationship with BBRU.<sup>8</sup> I served honorably, and I did not receive a disqualifying bad discharge from the Army. Indeed, I was not discharged at all—I simply returned to the status of a part-time Army National Guard officer. I applied for reemployment on 10/2/2020, well within the 90-day deadline to do so.<sup>9</sup>

BBRU reemployed me promptly within a few days after I applied, but only for one pay period. Before the end of October 2020, the company “laid me off.” This was a phony layoff. There were 100 BBRU employees working on that contract when I left the job in September 2019, and there were still 100 employees working there when I returned in October 2020. The specific BBRU job that I had held was filled by another employee—let us call her Mary Jones or MJ. MJ was hired by BBRU and assigned to that contract in October 2019, shortly after I left the job to go on active duty. I understand that MJ was doing a great job, and neither BBRU nor DOI wanted to see her replaced.

When BBRU fired me in late October 2020, I protested that the firing violated USERRA, but the company asserted that because of Virginia’s “right-to-work law” and its “employment-at-will” law an employer can fire an employee for any reason or no reason and no court can overturn an employer’s decision to fire an at-will employee like me.<sup>10</sup> Because the firing left me without a job, I contacted the Adjutant General (TAG) of my State to inquire about returning to Title 32 active duty. The TAG told me that he had been most pleased with my

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<sup>6</sup> Contrary to popular misconception, USERRA applies equally to voluntary and involuntary military service. See Law Review 30 (October 2001) and Law Review 161 (March 2005).

<sup>7</sup> USERRA applies to voluntary or involuntary training or service under title 32, which applies specifically to the National Guard, as well as title 10, which applies to all the armed forces. USERRA’s definition of “service in the uniformed services” includes “full-time National Guard duty.” See 38 U.S.C. § 4303(13).

<sup>8</sup> Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting an individual’s five-year limit with respect to an employer relationship.

<sup>9</sup> Because your period of service lasted more than 180 days, you had 90 days, starting on the date of release from active duty, to apply for reemployment. See 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>10</sup> Virginia’s right-to-work law and its employment-at-will doctrine are irrelevant to your USERRA rights. See Law Review 0619 (2006).

work during my recent active-duty period, and he offered me the opportunity to return to active duty for the rest of Fiscal Year 2021, from 11/1/2020 until 9/30/2021. I accepted the TAG's offer and returned to active duty, and I notified BBRU that I had returned to active duty.<sup>11</sup> While I am on active duty, I earn slightly more income per month than I earn in my civilian job.

During my most recent active-duty period, I explored other civilian job opportunities because I figured that returning to work at BBRU and continuing my National Guard career would be a constant struggle. I left active duty, as scheduled, on 9/30/2021, and I immediately applied for reemployment at BBRU. The company responded to my letter immediately with a certified letter saying that I had been lawfully fired in October 2020 and that I did not have rights under USERRA.

Again faced with the immediate prospect of unemployment, I resumed my job-hunting and quickly found another job in the DC metropolitan area, and that new job pays substantially more than what I had been earning at BBRU. I took the new job offer, and I am happy in the new job, but I am still angry that BBRU flouted USERRA, and I think that the company should be required to pay for its decision to flout Federal law.

I consulted an attorney in the DC area, an attorney who specializes in employment law, representing employees in cases against employers. She told me that BBRU clearly violated USERRA but because I did not lose any pay, and because I do not want to return to work at BBRU, there is no relief that a court can award, so she politely declined to take my case. What do you think about this situation?

**Answer, bottom line up front:**

It is clear that BBRU violated USERRA in late October 2020, when it fired you without cause during your one year of special protection, and again in October 2021, when it denied you reemployment upon your return from your most recent active-duty period, but if you do not want reinstatement at BBRU and if there is no back pay that the court can order the employer to pay you, there is no remedy available to you and no point in filing suit.

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<sup>11</sup> Because you returned to active duty to mitigate the harm caused by the employer's USERRA violation, that 11-month period of active duty does not count toward exhausting your five-year limit on the cumulative duration of your uniformed service periods with respect to your employer relationship with BBRU. The Department of Labor (DOL) USERRA regulations outline the kinds of service that are exempted from the five-year limit, and one of the exempted categories is as follows: "Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her." 20 C.F.R. § 1002.103(b).

Because you worked for BBRU for 11 years, including these two active-duty periods, you may be entitled to pension benefits from BBRU, under section 4318 of USERRA. You and the lawyer should explore the pension issue before you decide that your case is not worth filing.<sup>12</sup>

In the remainder of this article, I will discuss five points:

- a. Because you met the five USERRA conditions in October 2020 and again in October 2021, you were entitled to prompt reemployment *even if doing so necessitated firing MJ.*
- b. If DOI told BBRU to fire you, to avoid the need to replace MJ, DOI also violated USERRA.
- c. Firing you in late October 2020, well within your one year of special protection against discharge, except for cause, violated USERRA.
- d. Denying you reemployment in October 2021 violated USERRA again.
- e. But if you do not want reinstatement at BBRU and the company does not owe you any back pay, your case is essentially moot and there is no point in filing it.

**You are entitled to reemployment even if that means that Mary Jones must be displaced.**

The pertinent section in the DOL USERRA regulation is as follows:

Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. *The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.*<sup>13</sup>

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that your right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit<sup>14</sup> has held:

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<sup>12</sup> Under section 4318 of USERRA, 38 U.S.C. § 4318, you are entitled to be treated *as if you had been continuously employed in the civilian job* during each period that you were away from the civilian job for uniformed service, assuming of course that you met the five USERRA conditions for each military service period. Please see Law Review 21045 (August 2021) for a detailed discussion of section 4318. If you are entitled to substantial additional pension benefits from BBRUA, it may be worthwhile to insist on returning to work for the company for one pay period or one day, just for the pension benefits.

<sup>13</sup> 20 C.F.R. § 1002.139(a) (emphasis supplied).

<sup>14</sup> The 1<sup>st</sup> Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that “the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee’s absence, even if reemployment might require the termination of that replacement employee.<sup>15</sup>

The United States Court of Appeals for the Federal Circuit<sup>16</sup> has held:

The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols’ [Nichols was the returning veteran and plaintiff] former position was “unavailable” because it was occupied by another and thus it was within the department’s discretion to place Nichols in an equivalent position. This is incorrect. Nichols’ former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ... Although occupied by Walsh, Nichols’ former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.<sup>17</sup>

**If DOI told BBRU to fire you, or to deny your application for reemployment, to protect MJ from being displaced, DOI has also violated USERRA.**

Your situation is reminiscent of the case brought by Brigadier General Michael Silva, USAR, against the United States Department of Homeland Security (DHS).<sup>18</sup>

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<sup>15</sup> *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1<sup>st</sup> Cir. 2013).

<sup>16</sup> 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 the Merit Systems Protection Board.

<sup>17</sup> *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer’s failure to reemploy the returning veteran, I invite the reader’s attention to *Cole v. Swint*, 961 F.2d 58 (5<sup>th</sup> Cir. 1992); *Goggin v. Lincoln-St. Louis*, 702 F.2d 698, 704 (8<sup>th</sup> Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.*, 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5<sup>th</sup> Cir. 1981); *Jennings v. Illinois Office of Education*, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7<sup>th</sup> Cir. 1979); and *Musciante v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

<sup>18</sup> See *Silva v. Department of Homeland Security*, 2009 MSPB 189 (Merit Systems Protection Board 9/23/2009). General Silva, a life member of ROA and a past National President, left his job with a DHS contractor to report to active duty and deploy to Iraq. When he was released from active duty, he met the five USERRA conditions for reemployment, but the contractor that had employed him refused to reemploy him because the DHS contracting officer threatened to terminate the company’s contract if it did so. In this situation, DHS was Silva’s “joint employer” and DHS violated USERRA by standing in the way of the contractor complying with its USERRA

**Upon your reemployment in October 2020, you were entitled to one year of special protection against discharge, except for cause. BBRU violated USERRA by firing you within the special protection period.**

The pertinent section of USERRA is as follows:

- (c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause--
  - (1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
  - (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.<sup>19</sup>

The VRRA contained a similar provision. From the beginning, the Federal reemployment statute has had a “special protection against discharge” provision, because Congress has always recognized that employers will be tempted to make a mockery of the reemployment obligation by reinstating the returning veteran only to fire him or her shortly thereafter. USERRA made a small change in the calculation of the duration of the special protection period but did not change the underlying concept. USERRA’s legislative history provides as follows concerning section 4316(c):

Section 4315(d) [later renumbered as 4316(c)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. Under current law [the VRRA] there is a one-year period of special protection against discharge without cause after return from active duty and six months protection after return from initial active duty for training. There is no explicit protection [under the VRRA] for employees returning from active duty for training or inactive duty training regardless of length. Under this provision, the protection [period] would begin only upon proper and complete reinstatement. *See O’Mara v. Peterson Sand & Gravel Co.*, 498 F.2d 896, 898 (7<sup>th</sup> Cir. 1974).

The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement.

As expressed in *Carter v. United States*, 407 F.2d 1238, 1244 (D.C. Cir. 1968), “cause” must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice, expressed or fairly implied, that such conduct would be

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obligation to reemploy Silva, so the Merit System Protection Board (MSPB) held. I discuss the *Silva* case in detail in Law Review 09053 and Law Review 09053 Update.

<sup>19</sup> 38 U.S.C. § 4316(c). This refers to section 4316(c) of title 38 of the United States Code.

cause for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario*, 796 F. Supp. 166, 172 (E.D. Pa. 1992).

The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v. Louisville & Nashville Railroad Co.*, 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the “escalator” principle would have eliminated a person’s job or placed that person on layoff in the normal course.<sup>20</sup>

As I have explained in Law Review 17068 (June 2017), *The USERRA Manual* by Kathryn Piscitelli and Edward Still is the definitive reference on USERRA. In their book, they devote nine pages to section 4316(c).<sup>21</sup>

Two sections of the DOL USERRA Regulations address the “special protection against discharge” provision in section 4316(c), as follows:

#### **Does USERRA provide the employee with protection against discharge?**

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**Yes.** If the employee’s most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause —

- (a)** For 180 days after the employee’s date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,
- (b)** For one year after the date of reemployment if the employee’s most recent period of uniformed service was more than 180 days.<sup>22</sup>

#### **What constitutes cause for discharge under USERRA?**

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The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.

- (a)** In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.

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<sup>20</sup> House Committee Report, April 28, 1993, H.R. Rep. 103-65 (part 1), reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The three quoted paragraphs can be found on pages 821-22 of the 2021 edition of the *Manual*.

<sup>21</sup> *The USERRA Manual*, 2021 edition, section 6:6, pages 272-280.

<sup>22</sup> 20 C.F.R. § 1002.247 (bold question and bold “yes” in original).

**(b)** If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.<sup>23</sup>

Because you were fired shortly after you left active duty, the firing is unlawful unless BBRU can *prove* (not just say) that the firing was for cause.

**If BBRU had waited a year and a day and then fired you, the firing would violate section 4311 of USERRA.**

Section 4311 of USERRA 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, (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—

**(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

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<sup>23</sup> 20 C.F.R. § 1002.248 (bold question in original).

*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>24</sup>

### **Denying you reemployment in October 2021 violated USERRA again.**

When you left active duty on 9/30/2021, you again were entitled to reemployment because you met the five USERRA conditions. You left your job<sup>25</sup> to perform uniformed service, and you gave BBRU prior oral or written notice. You did not exceed the cumulative five-year limit on the duration of your periods of uniformed service, relating to your employer relationship with BBRU. You served honorably, and you did not receive one of the disqualifying bad discharges enumerated in section 4304 of USERRA.<sup>26</sup> After you were released from active duty, you made a timely application for reemployment, well within the 90-day limit. You were entitled to prompt reemployment, and BBRU violated USERRA when it refused to reemploy you.

### **USERRA's enforcement mechanism**

USERRA provides:

#### **(d) Remedies.**

**(1)** In any action under this section, the court may award relief as follows:

**(A)** The court may require the employer to comply with the provisions of this chapter.

**(B)** The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

**(C)** The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

**(2)**

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<sup>24</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>25</sup> Because the October 2020 firing was unlawful, you were still an employee of BBRU, for legal purposes.

<sup>26</sup> 38 U.S.C. § 4304.

**(A)** Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

**(B)** In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

**(3)** A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

**(e) Equity powers.** The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.<sup>27</sup>

### **Your case may be essentially moot.**

If you prevail in your lawsuit against BBRU, “The court may require the employer to comply with the provisions of this chapter.”<sup>28</sup> But since you are making more salary in your new job and do not want reinstatement at BBRU, this injunctive relief is moot.

USERRA’s enforcement section further provides: “The court may require the employer the employer to compensate the person *for any loss of wages or benefits* suffered by reason of such employer’s failure to comply with the provisions of this chapter.”<sup>29</sup> The “loss of wages or benefits” phrase clearly indicates that money damages are available only for *pecuniary damages*—money damages are not available for humiliation, mental anguish, or other nonpecuniary harms.<sup>30</sup>

It appears that you have no *pecuniary damages*—during the 11 months that you returned to active duty after BBRU fired you in October 2020, you suffered no net loss of pay because your military active-duty pay was greater than your regular BBRU pay. After BBRU denied you reemployment in October 2021, you suffered no net loss of pay because you quickly found a new job, with another employer, which pays more than you would have earned had you returned to BBRU.

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<sup>27</sup> 38 U.S.C. § 4323(d) and (e).

<sup>28</sup> 38 U.S.C. § 4323(d)(1)(A).

<sup>29</sup> 38 U.S.C. § 4323(d)(1)(B) (emphasis supplied).

<sup>30</sup> See Law Review 18013 (January 2018) and Law Review 15088 (October 2015).

Finally, USERRA's enforcement section provides: "The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful."<sup>31</sup>

If you prove that the employer violated USERRA willfully, you are entitled to double damages, but two times zero is zero. It seems that you are not entitled to any relief that the court has the authority to award. Thus, there is no point to filing this case.

**Q: It is unconscionable that BBRU is getting off scot-free after willfully flouting USERRA, just because I was diligent and resourceful enough to find another job swiftly and that new job pays a little more than what I would have earned at BBRU. What do you say about that?**

**A:** In this article, I am telling you *what the law is, not what I want it to be*. In Law Review 15089 (October 2015), I proposed that Congress amend section 4323(d)(1)(C) to provide that the liquidated damages for a willful USERRA should be the greater of the actual damages or \$50,000. My proposal has not been enacted. I renew the proposal now. Your situation is an excellent example of the kind of situation that requires my suggested amendment.

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<sup>31</sup> 38 U.S.C. § 4323(d)(1)(C).

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<sup>32</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.