

## **There Is No Statute of Limitations under USERRA, But USERRA's Preclusion of Statutes of Limitations Does Not Apply to other Kinds of Claims.**

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[About Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

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**Q: I am a Captain (O-6) in the Navy Reserve Nurse Corps and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).**

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<sup>1</sup> I invite the reader's attention to <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 <mailto:swright@roa.org>.

<sup>3</sup> 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

**On the civilian side, I am a nurse for the Veterans Health Administration (VHA), a component of the United States Department of Veterans' Affairs (VA). For many years, my VHA supervisors have given me a hard time about my Navy Reserve membership and the absences from work that have been necessitated by my training and other service in the Navy Reserve. When I have had problems with my supervisors about this matter, I have contacted the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR),<sup>4</sup> and volunteer ombudsmen from that organization have helped me resolve those problems by contacting my supervisors and explaining USERRA to them.**

**Recently, I applied for a promotion at the VHA, from GS-14 to GS-15. There were 25 candidates for the promotion opportunity, and I was one of five finalists interviewed by a panel of five supervisors. I believe that I was denied the promotion based on my membership in the Navy Reserve, my absences from work for Navy Reserve training and other service, and my obligation to make myself available for future service in the Navy and Navy Reserve. During my interview for the promotion, two of the five supervisors asked me pointed questions about the Navy Reserve, including about the possibility that I could be mobilized again, as I was in 2004-05 and 2009-10, and when I planned to retire from the Navy Reserve. The chair of the interview panel specifically asked me if I was willing to retire from the Navy Reserve if I were selected for the promotion. I declined to answer that question.**

**I learned that another candidate had been selected for the promotion on 10/15/2021, and I contacted ESGR to make a complaint the very next day. ESGR headquarters assigned my case to an ombudsman in my city, the same man who has helped me several times. The ombudsman contacted the personnel office of the VA medical facility where I work, and the personnel manager adamantly denied that my Navy Reserve service had anything to do with my non-selection for the promotion. The ESGR ombudsman closed the ESGR case of 10/25/2021 and advised me to file a complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), which I did on 11/1/2021. A month later, on 12/1/2021, a DOL-VETS investigator contacted me, informing me that he would be investigating my USERRA complaint against the VHA.**

**I believe that I was discriminated against in this promotion opportunity because of my Navy Reserve service, but I also think that the panel discriminated against me based on my age (55) and my national origin (Asian American). When I had a long video teleconference with the DOL-VETS investigator on 12/8/2021, I brought up evidence that the VHA had discriminated against me based on my age and my national origin. The investigator told me that he and his agency**

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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.

<sup>4</sup> DOD established ESGR in 1972, 50 years ago this year. You can reach ESGR at 800-336-4590, and you can find the organization's website at [www.esgr.mil](http://www.esgr.mil). Please see Law Review 12036 (April 2012) for more information about ESGR.

**could only consider my USERRA complaint and that if I wanted to assert Equal Employment Opportunity (EEO) complaints I would need to start that process by filing an informal EEO complaint with an EEO counselor at the VHA medical facility where I work.**

**The very next day, I found an EEO counselor at work and tried to file an informal EEO complaint. The counselor told me that I was already too late to file such a complaint because the deadline for doing so was 45 days after I learned of the employment action about which I was complaining. The counselor told me that the deadline for filing an EEO complaint about my non-selection for the promotion was 11/29/2021 and that I was already more than a week past the deadline.**

**In Law Review 19076 (August 2019), you wrote that there is no statute of limitations for filing a USERRA claim. What gives? And is it true that the statute of limitations for filing an EEO complaint, as a Federal employee, is only 45 days?**

#### **Answer, bottom line up front**

It is true that there is no statute of limitations for filing a USERRA claim, but USERRA's preclusion of statutes of limitations only applies to USERRA claims. It is true that the deadline for a Federal employee to file an EEO complaint is just 45 days after the employee learns of the personnel action about which the employee seeks to complain. Your USERRA complaint to ESGR and then to DOL-VETS did not toll (stop the running of) the 45-day deadline for filing the EEO complaint.

#### **Explanation**

USERRA's provision about statutes of limitations reads as follows: "If any person seeks to file a [USERRA] complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court *under this chapter*, there shall be no limit on the period for filing the complaint or claim."<sup>5</sup> This wording makes clear that USERRA's preclusion of the application of statutes of limitations only applies to USERRA claims.

It is true that the statute of limitations for a Federal employee to file an EEO complaint is just 45 days. A treatise on Federal employment discrimination law states:

Federal employees have 45 days from the date on which they learned of an action they consider discriminatory (e.g., non-selection, discipline, etc.) to file an informal EEO complaint with an agency's EEO counselor. In one of the most significant employment law cases in recent years, *Morgan v. National Railroad Passenger Corp.*, 536 U.S. 101 (2002), the Supreme Court made it more difficult for employees to claim relief for discrimination against them which they claim to be part of a "continuing violation" pre-dating this 45-day window.

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<sup>5</sup> 38 U.S.C. § 4327(b) (emphasis supplied).

In other words, if you suffered an adverse employment action more than 45 days ago, and you have not contacted an EEO counselor, it is probably too late to file a complaint about that action, because of *Morgan*.<sup>6</sup>

Discriminating against you based on your age (greater than 40) violates the Age Discrimination in Employment Act (ADEA).<sup>7</sup> Discriminating against you based on your national origin violates Title VII of the Civil Rights Act of 1964.<sup>8</sup> These two statutes, plus the Americans With Disabilities Act (ADA) and other statutes are part of the EEO process and are subject to EEO statutes of limitations. USERRA has its own enforcement mechanism and is not subject to EEO statutes of limitations.

You may have had valid ADEA and Title VII complaints regarding your non-selection for the promotion opportunity, but those complaints are now time-barred. What you have left is what sounds like a strong USERRA complaint.

**Q: What happens now with my USERRA complaint?**

**A:** Any person who claims that his or her USERRA rights have been violated by an employer (Federal, State, local, or private sector) can file a written USERRA complaint with DOL-VETS.<sup>9</sup> You have filed such a complaint, and the process is well under way.

DOL-VETS is required to investigate your complaint.<sup>10</sup> That investigation has started. DOL-VETS has subpoena authority for USERRA investigations.<sup>11</sup> That means that the agency can go to Federal court, if necessary, to force the VHA to provide records and the deposition testimony of the interview panel members and other VHA employees who have information relevant to your complaint.

DOL-VETS is required to complete its investigation within 90 days after it received your complaint.<sup>12</sup> When DOL-VETS completes its investigation, it must then inform you of the results of the investigation and of your options going forward.<sup>13</sup>

After DOL-VETS has completed its investigation and has informed you of the results, you can request (in effect, insist) that DOL-VETS refer your case file to the United States Office of Special Counsel (OSC).<sup>14</sup> If OSC is reasonably satisfied that you are entitled to the USERRA benefits that

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<sup>6</sup> See <https://www.fedweek-legal/federal-legal-corner-missing-the-deadline-for-filing-an-eeo-complaint/>.

<sup>7</sup> 29 U.S.C. §§ 621 et seq.

<sup>8</sup> 42 U.S.C. §§ 2000e et seq.

<sup>9</sup> 38 U.S.C. § 4322(a) and (b).

<sup>10</sup> 38 U.S.C. § 4322(d).

<sup>11</sup> 38 U.S.C. § 4326.

<sup>12</sup> 38 U.S.C. § 4322(f).

<sup>13</sup> 38 U.S.C. § 4322(e).

<sup>14</sup> 38 U.S.C. § 4324(a)(1). OSC is a small Federal executive agency that is headed by the Special Counsel, who is appointed by the President with Senate confirmation. The Civil Service Reform Act of 1978 divided the former Civil Service Commission into three separate Federal agencies, including OSC, the Office of Personnel Management (OPM),

you seek, it may file an action on your behalf with the Merit Systems Protection Board (MSPB) and represent you in prosecuting that action.<sup>15</sup>

When DOL-VETS informs you of the results of its investigation, you can retain private counsel and bring your own case in the MSPB instead of requesting referral to OSC.<sup>16</sup> You could have bypassed DOL-VETS altogether and filed your case directly with the MSPB,<sup>17</sup> but since you have already filed with DOL-VETS that option is no longer available to you. If you request referral to OSC and OSC declines your request for representation, you can file with the MSPB directly.<sup>18</sup>

If you are represented by private counsel in an MSPB USERRA proceeding and you prevail, the MSPB may, in its discretion, award you attorney fees, expert witness fees, and other litigation expenses.<sup>19</sup>

**Q: Can I represent myself in a USERRA case before the MSPB?**

**A:** Yes, but I do not recommend that course of action. Abraham Lincoln said: “A man who represents himself has a fool for a client.”

**Q: If OSC takes my case, or if I retain private counsel to represent me, what happens next?**

**A:** The case will be assigned to an Administrative Judge (AJ) of the MSPB. The AJ will conduct a hearing and make findings of fact and conclusions of law. The losing party at the AJ level, either you or the VA, can appeal to the MSPB itself, at its headquarters in Washington. The individual complainant, like you, but not the agency, can appeal the final decision of the MSPB to the United States Court of Appeals for the Federal Circuit.<sup>20</sup>

If you lose at the AJ level, you can wait 35 days for the AJ’s decision to become the final decision of the MSPB, and then you can appeal to the Federal Circuit.<sup>21</sup> Because the MSPB currently lacks a quorum to decide cases, this is the course that you and your attorney, or OSC, will probably want to take.

**Q: What is the MSPB? How are the members appointed?**

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and the Merit Systems Protection Board (MSPB). OPM inherited the administrative and policy-making functions. OSC inherited the investigative and prosecutive functions. The MSPB inherited the adjudicatory functions.

<sup>15</sup> 38 U.S.C. § 4324(a)(2).

<sup>16</sup> 38 U.S.C. § 4324(b)(2) and (3).

<sup>17</sup> 38 U.S.C. § 4324(b)(1).

<sup>18</sup> 38 U.S.C. § 4324(b)(4).

<sup>19</sup> 38 U.S.C. § 4324(c)(4).

<sup>20</sup> 38 U.S.C. § 4324(d)(1).

<sup>21</sup> See Law Review 21027 (April 2021).

**A:** The MSPB is a quasi-judicial Federal executive agency. Under the Civil Service Reform Act of 1978, it inherited the adjudicative functions of the former Civil Service Commission. The MSPB has, or is supposed to have, three members, generally two of the President's political party and one of another party. The two members of the President's party generally serve as the Chair and Vice Chair.

Each member must be nominated by the President and confirmed by the Senate, and they serve for staggered seven-year terms. When the term of a confirmed member expires, he can continue to serve for an overtime period of one additional year or until a successor has been nominated by the President and confirmed by the Senate, whichever comes first. The last time the MSPB had a full complement was during the Obama Administration.

The Vice Chair, appointed by President Obama, left office in 2015, leaving two members, and two is the quorum. The Chair, appointed by President Obama, left office on 1/13/2017 (one week before President Trump was inaugurated), at the end of her seven-year term and her one-year overtime period. That left one member, Mark Robbins, who had been the Republican member nominated by President Obama and confirmed by the Senate. His seven-year term expired in March 2018, and his one-year overtime period expired in March 2019, almost three years ago.

The MSPB has been without any members for almost three years, but the work of the agency goes on. The AJs are deciding cases, and cases appealed to the MSPB go into a backlog that now exceeds 3,000 cases. When the MSPB finally has a quorum of at least two confirmed members, it will likely need to decide the cases in the backlog before it addresses any new appeals.

During his term, President Trump nominated three highly-qualified persons (two Republicans and one Democrat) for MSPB positions, but the Senate never acted upon these nominations. President Biden has nominated three other highly-qualified persons (two Democrats and one Republican), but the Senate has not yet acted on these nominations. *I call upon the Senate to act promptly to confirm these nominees and fill these critical vacancies.*

**Q: What do I have to prove to prevail on a USERRA discrimination case in the MSPB or the Federal Circuit?**

**A:** As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, a person who was drafted or who voluntarily enlisted in the armed forces was entitled to reemployment in the pre-service civilian job after honorable service. In 1955 and 1960, Congress expanded the VRRA to apply also to initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard members.

When leaving a job for service and returning to the job became a recurring phenomenon rather than a once-in-a-lifetime experience, Congress amended the VRRA in 1968, adding a provision making it unlawful for an employer to fire a Reserve Component service member or to deny such a person promotion or “incidents or advantages of employment” based on “any obligation as a member of a Reserve Component of the Armed Forces.” In 1986, Congress amended this provision to forbid discrimination in hiring.

The VRRA only forbade discrimination based on “any obligation as a member of a Reserve Component of the armed forces.” USERRA’s anti-discrimination provision is much broader. It forbids the denial of initial employment, retention in employment, promotion, or a benefit of employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.<sup>22</sup>

Just prior to the enactment of USERRA in 1994, the pertinent section of the VRRA read as follows:

Any person who seeks or holds a position described in clause (A) [a position with the United States Government, any territory or possession of the United States or a political subdivision of a territory or possession, or the Government of the District of Columbia] or (B) [a state, a political subdivision of a state, or a private employer] of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment *because of any obligation as a member of a Reserve component of the Armed Forces.*<sup>23</sup>

USERRA (enacted in 1994) contains a much broader and stronger anti-discrimination provision, as follows:

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§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

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- **(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

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<sup>22</sup> 38 U.S.C. § 4311(a).

<sup>23</sup> 38 U.S.C. § 4321(b)(3) (1988 edition of the United States Code) (emphasis supplied).

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 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>

Section 4321(b)(3) of the VRRA forbade discrimination by employers only if such discrimination was “because of any obligation as a member of a Reserve component of the Armed Forces.” Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

- a. Membership in a uniformed service.<sup>25</sup>
- b. Application to join a uniformed service.
- c. Performing uniformed service.
- d. Having performed uniformed service in the past.
- e. Application to perform uniformed service.
- f. Obligation to perform uniformed service.
- g. Having taken an action to enforce a USERRA protection for any person.
- h. Having testified or otherwise made a statement in or in connection with a USERRA proceeding.

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<sup>24</sup> 38 U.S.C. § 4311 (emphasis supplied).

<sup>25</sup> As defined by USERRA, the uniformed services include the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS) and the commissioned corps of the National Oceanic & Atmospheric Administration. 38 U.S.C. § 4303(16). Under more recent amendments, Intermittent Disaster Response Appointees of the National Disaster Medical System under the cognizance of the Department of Health and Human Services and persons who serve in the National Urban Search and Rescue Response System under the cognizance of the Federal Emergency Management Agency in the Department of Homeland Security have reemployment rights under USERRA. Please see Law Review 17011 (February 2017). Very recently, Congress and the President established the Space Force as a new uniformed service.

- i. Having assisted or otherwise participated in a USERRA investigation.
- j. Having exercised a USERRA right.

Under section 4311(c) of USERRA,<sup>26</sup> it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It is sufficient to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves motivating factor, the *burden of proof shifts to the employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.*

USERRA's legislative history explains section 4311 as follows:

Current law [the VRRA] 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, current employees who seek to join Reserve or National Guard units (see *Boyle v. Burke*, 925 F.2d 497 (1<sup>st</sup> 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 (7<sup>th</sup> 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 also 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.

If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.

Section 4311(b) [now 4311(c), as amended in 1996] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a *prima facie* case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) [later renumbered 4321(b)(3)] of title 38, in 1968. See Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89<sup>th</sup> Cong., 1<sup>st</sup> Session at 5320 (February 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative

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<sup>26</sup> 38 U.S.C. § 4311(c).

intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. See 132 Cong. Rec. 29226 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (see *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10<sup>th</sup> Cir. 1988), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.<sup>27</sup>

## **USERRA Regulations**

Two sections of the Department of Labor (DOL) USERRA Regulations address how to prove a violation of section 4311:

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### **§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?**

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The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.<sup>28</sup>

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### **§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?**

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- (a) In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
  - (1) Membership or application for membership in a uniformed service;
  - (2) Performance of service, application for service, or obligation for service in a uniformed service;
  - (3) Action taken to enforce a protection afforded any person under USERRA;
  - (4) Testimony or statement made in or in connection with a USERRA proceeding;

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<sup>27</sup> House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 805-07 of the 2021 edition of the *Manual*.

<sup>28</sup> 20 C.F.R. § 1002.22 (bold question in original).

- (5) Assistance or participation in a USERRA investigation; or,
- (6) Exercise of a right provided for by USERRA.
- (b) If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.<sup>29</sup>

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*You have a strong USERRA case.* The fact that two of the five members of the interview panel asked you about your Navy Reserve status is sufficient, in and of itself, to prove that your service was a *motivating factor* in the panel's decision to select another candidate, not you, for the promotion opportunity.<sup>30</sup> If your service had not been a factor in the committee's deliberations, panel members would not have asked you about it.

#### **Please join or support ROA**

This article is one of 2,300-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 on 10/1/1922 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 almost a century, 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.

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<sup>29</sup> 20 C.F.R. § 1002.23 (bold question in original). Please see Law Review 17016 (March 2017) for a detailed discussion of the Supreme Court and Court of Appeals caselaw on section 4311 of USERRA.

<sup>30</sup> See *Horneman v. Department of Veterans Affairs*, No. DE-4324-15-0102-I-1 (Merit Systems Protection Board March 4, 2016). I discuss that case in detail in Law Review 16014 (March 2016).

If you are now serving or have ever served in any one of our nation's eight<sup>31</sup> 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.

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<sup>31</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.