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**Joe Smith Has the Right to Reemployment at your Federal Agency,
Despite his “Resignation” when he Left his Job to Enlist in the Army.**

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

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Q: I am the Personnel Director for a Federal executive agency, and I must apply the Uniformed Services Employment and Reemployment Rights Act (USERRA) and many other laws every day with respect to employees of this agency, applicants for employment, and

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “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 Spouses’ 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.

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 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>.

former employees returning from military service and seeking reemployment. I found one of your “Law Review” articles while doing Internet research on USERRA.

We had an employee of our agency (Let us call him “Joe Smith.”) who worked here for two years and then left in September 2017, when he enlisted in the Regular Army. He told his supervisor and me, the Personnel Director, that he was “resigning” from Federal civilian employment and that he intended to remain on full-time active duty for a full career of 20 years or more and that he would “never” return to work for this agency.

Smith joined the Regular Army, not the Army National Guard or Army Reserve. Does USERRA even apply to a person like Smith?

Several times each month, we (the Federal agency where I work) have employees leave their jobs for voluntary or involuntary military service, usually for a few months at a time. In that situation, we put the employee on a “Leave Without Pay—Uniformed Service” (LWOP-US) status. We did not put Smith on LWOP-US because he made it clear, both orally and in writing, that he was resigning and that he would not be returning to Federal civilian employment.

Although Smith said that he intended to remain on active duty for 20 years or more, he in fact was on active duty for exactly four years, from 10/1/2017 until 9/30/2021. On 11/1/2021, he made a formal, written application for reemployment, in a letter he sent to me by certified mail. He enclosed a copy of his DD-214, showing that his military service was honorable, that the start date was 10/1/2017, and that the end date was 9/30/2021. I denied his request for reemployment for two reasons. First, I think that USERRA does not apply to Smith because he served in the Regular Army, not the Army Reserve or Army National Guard. Second, I think that he waived his right to reemployment, if he ever had such a right, because he unambiguously resigned from Federal civilian employment and told us that he would not be returning.

Just recently, Smith filed a formal complaint with the Veterans’ Employment and Training Service, United States Department of Labor (DOL-VETS), asserting that we violated USERRA when we denied him reemployment almost a year ago.

Was Smith entitled to reemployment in November 2021? What should we do today?

Answer, bottom line up front

Yes, USERRA definitely applies to service in the Regular Army, or the Active Component of any service, as well as to service in the Army Reserve, the Army National Guard, or any other

Reserve Component of the armed forces.³ Second, Smith clearly meets the five USERRA conditions for reemployment, and your agency is required to reemploy him now and to compensate him for the pay and benefits that he lost because of the agency's delay in complying with USERRA.

Explanation

Smith, or any service member or veteran, is entitled to reemployment if he or she meets the five USERRA conditions:⁴

- a. Must have left a civilian job (Federal, State, local, or private sector) to perform voluntary or involuntary service in the uniformed services, as defined by USERRA.⁵
- b. Must have given the employer prior oral or written notice.⁶
- c. Must not have exceeded the five-year cumulative limit on the duration of the person's period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.⁷
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.⁸
- e. After release from the period of service, must have made a timely application for reemployment.⁹

Smith clearly meets these five conditions. In 2017, he left his civilian job with your agency to perform active duty in the Army, and he gave your agency prior notice. His four-year active-duty period did not exceed the five-year limit. After he was released from active duty on 9/30/2021, he applied for reemployment on 11/1/2021, well within the 90-day deadline.

Smith did not receive a disqualifying bad discharge from the Army. Indeed, he was not discharged at all, only released from active duty. When Smith enlisted in 2017, he signed on for eight years, the standard period for all military enlistments. If Smith chooses not to affiliate with the National Guard or Army Reserve, he will be assigned to the Individual Ready Reserve

³ See Law Review 20045 (May 2020),

⁴ See generally Law Review 15116 (December 2015).

⁵ See 38 U.S.C. § 4312(a).

⁶ See 38 U.S.C. § 4312(a)(1).

⁷ See 38 U.S.C. § 4312(c). As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit.

⁸ See 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious misconduct, as well as "other than honorable" administrative discharges.

⁹ After a period of service of 181 days or more, the person has 90 days to apply for reemployment. See 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

(IRR). In 2025, eight years after his enlistment, the Army will send him an honorable discharge by mail.

I would not have advised Smith to use the word “resign” when he gave notice of his departure from his job, in 2017, but his use of that word is not fatal to his right to reemployment.¹⁰ When Smith left his job with your agency in 2017, he was not required to predict that he would return after completing his active-duty period, and his statement that he intended to remain on active duty for a full career of 20 years or more does not defeat his right to reemployment. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.¹¹

Because Smith met the five USERRA conditions in November 2021, he was entitled to *prompt* reemployment, within 14 days after his application for reemployment on 11/1/2021.¹² If Smith initiates an action against your agency in the Merit Systems Protection Board (MSPB), he will prevail, and the MSPB “shall enter an order requiring the agency or Office to comply with such provisions [USERRA] and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.”¹³

Please do not waste everyone’s time and resources by continuing to violate USERRA. Please reinstate Smith now, and please pay him the amount necessary to compensate him for the pay and benefits he lost because your agency failed to comply with USERRA in November 2021.¹⁴

¹⁰ See Law Review 63 (January-February 2003).

¹¹ 20 C.F.R. § 1002.88 (bold question in original).

¹² See 20 C.F.R. §§ 1002.180 and 1002.181.

¹³ 38 U.S.C. § 4324(c)(2). See generally Law Review 206 (December 2005) for a detailed discussion of the computation of back pay in USERRA cases.

¹⁴ See Law Review 206 (December 2005) for a detailed discussion of the computation of back pay under USERRA.

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This article is one of 2,000-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 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.

If you are now serving or have ever served in any one of our nation’s eight¹⁵ 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. 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
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¹⁵ Congress recently established the United States Space Force as the 8th uniformed service.

¹⁶ You can also contribute on-line at www.roa.org.