

LAW REVIEW¹ 22056

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**It Is Unlawful for your Pre-Service Employer, a Federal Agency,
To Fire you for Exceeding the Five-Year Limit.**

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

1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

2.0—Paid leave for government employees who are Reserve Component members

Q: I am a Major in the Army Reserve and a life member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

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>.

³ 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

While in college, I participated in the Army's Reserve Officers Training Corps, and when I graduated in 2007, I was commissioned a Second Lieutenant. For the next seven years, I was on full-time active duty, including a one-year tour in Iraq and another in Afghanistan. I left active duty in 2014 and affiliated with the Army Reserve. I also started a Federal civilian job shortly after I left active duty.

For the next five years, I was a traditional Army Reserve officer, performing one weekend per month of inactive duty training (drills) and two or three weeks per year of annual training. In 2019, the Army offered me the opportunity to return to active duty, this time in the Active Guard & Reserve (AGR) Program. I agreed to serve on active duty for three years, starting on 10/1/2019. I gave both oral and notice to my direct supervisor and to the personnel office of the Federal agency where I worked, telling them that I would be on active for the next three years, until 9/30/2022.

During the summer of 2022, as I approached the end of my three-year AGR tour, the Army asked me to extend for another three-year tour, and I agreed to do so. I gave written notice to the Federal agency that I had agreed to remain on active duty for another three years, until 9/30/2025.

The Federal agency responded in writing, saying that by extending my active-duty period beyond the initial three-year AGR tour I have given up my right to reemployment. The agency demanded that I resign and threatened to fire me if I do not resign. How does USERRA apply to my situation? Is it lawful for the agency to fire me for agreeing to remain on active duty for another three years?

Answer, bottom line up front

The five-year limit is an eligibility criterion for reemployment. Serving on active duty, even beyond the five-year limit, is not misconduct that would justify firing you. If the agency fires you while you are on active duty, that is a violation of section 4311 of USERRA.⁴

If you remain on active duty past 9/30/2024 (the expiration of your five-year limit), you will not have the right to reemployment, even if you meet the other four USERRA eligibility requirements. But denying you reemployment or determining that you will not have the right to reemployment in the future is not the same thing as firing you.

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.

⁴ 38 U.S.C. § 4311.

Explanation

USERRA's five conditions for reemployment

Like any service member or veteran, you are entitled to reemployment if you meet the five USERRA conditions:⁵

- 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.⁶
- b. Must have given the employer prior oral or written notice.⁷
- 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.⁸
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.⁹
- e. After release from the period of service, must have made a timely application for reemployment.¹⁰

You already meet the first two conditions. You left your civilian job in September 2019 to enter active duty in the AGR Program, and you gave the employer prior notice. I am sure that your service has been and will be honorable and that you will not receive a disqualifying bad discharge when you leave active duty. You have it in your power to apply for reemployment within 90 days after you leave active duty. The "long pole in the tent" is the five-year limit.

USERRA's five-year limit

Section 4312(c) of USERRA sets forth the five-year limit, and the exemptions from the limit, as follows:

(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, *with respect to the*

⁵ See generally Law Review 15116 (December 2015).

⁶ See 38 U.S.C. § 4312(a).

⁷ See 38 U.S.C. § 4312(a)(1).

⁸ 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.

⁹ 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.

¹⁰ 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.

employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

- (1) that is required, beyond five years, to complete an initial period of obligated service;
- (2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
- (3) *performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or*
- (4) performed by a member of a uniformed service who is—
 - (A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;
 - (B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
 - (C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
 - (D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
 - (E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or
 - (F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.¹¹

Your seven years of active duty, from 2007 to 2014, do not count toward your five-year limit with respect to the Federal Government as your civilian employer because that period of active duty was before you began your Federal civilian employment in 2014.¹² The drill weekends and annual training tours that you performed during your five years of Federal civilian employment

¹¹ 38 U.S.C. § 4312(c) (emphasis supplied).

¹² 38 U.S.C. § 4312(c) (pertinent clause italicized above).

(2014-19) are also exempt from the computation of your five-year limit.¹³ When you entered active duty in the AGR Program on 10/1/2019, you had the full five-year period available to use.

Voluntary AGR duty is not exempt from the five-year limit under any of the subsections of section 4312(c), copied above. If you remain on active duty past 9/30/2024 (the fifth anniversary of your entry on active duty in the AGR Program), you will not have the right to reemployment because you will be beyond the five-year limit. But you have not yet exceeded the five-year limit, and it is not certain that you will exceed it. The Army could release you from active duty on or before 9/30/2024 for any number of reasons. For example, illness or injury could render you incapable of performing your military duties, and the Army would release you from active duty under those circumstances.

Firing you now, or even in October 2024, would violate USERRA.

You have not applied for reemployment, and you cannot apply for reemployment now because you are still on active duty. There is no occasion for the Federal agency to adjudicate an application for reemployment at this time because you have not applied for reemployment.

If the agency fires you now, or even in October 2024, that action violates section 4311(a) of USERRA, which provides:

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.¹⁴

Absenting oneself from Federal civilian employment, even beyond the five-year limit, *is not misconduct that justifies firing the person from Federal civilian employment*. If you remain on active duty past 9/30/2024, the agency can administratively acknowledge that you will not have the right to reemployment because you are beyond the five-year limit, *but that is not the same thing as firing you*.

Federal agencies normally use the USAJOBS system, operated by the United States Office of Personnel Management (OPM), to fill Federal civilian vacancies. If the job opportunity is attractive, there may be 20 or more applicants. The first step in the selection process is to create a list of five or so applicants who seem to be the best qualified, and then to interview

¹³ 38 U.S.C. § 4312(c)(3) (pertinent clause italicized above).

¹⁴ 38 U.S.C. § 4311(a) (emphasis supplied).

those finalists. If the OPM record shows that you were fired from Federal civilian employment in 2022 or 2024, you will never make it to second base (the interview process). If the agency fires you, that will effectively make you unemployable for the remainder of your life.

Some employers argue: We did not fire Joe Smith because of his military service. We fired him because he was *absent from work* while performing that service. In an important USERRA case, the United States Postal Service made that argument, and the Merit Systems Protection Board (MSPB) accepted it. On appeal, the Federal Circuit firmly rejected this nonsensical argument, holding:

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.¹⁵

Q: As a Federal civilian employee who is away from the civilian job for military duty, I receive 15 workdays per year of *paid* military leave. Will I continue to receive this paid military leave if I remain on active duty after 9/30/2024?

A: Probably not. Your right to paid military leave is not under USERRA. Rather, you are entitled to paid military leave under section 6323 of title 5 of the United States Code, which provides:

(a)

(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502–505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title), the rate at which leave

¹⁵ *Erickson v. United States Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009). The Federal Circuit is the Federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.

(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who—

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and

(2)

(A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury—

(i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or

(ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or

(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year. Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d)

(1) A military reserve technician described in section 8401(30) is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.

(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.¹⁶

Section 6323 does not specify how long the right to receive 15 workdays of paid military leave per fiscal year is to continue, but it seems unlikely that Congress intended that this paid military leave would continue for an active-duty career of 20 years or more. It is reasonable to conclude that your right to paid military leave ends on 10/1/2024 if you are still on active duty on that date.

Please join or support ROA

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.

¹⁶ 5 U.S.C. § 6323.

If you are now serving or have ever served in any one of our nation's eight¹⁷ 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
1 Constitution Ave. NE
Washington, DC 20002¹⁸

¹⁷ Congress recently established the United States Space Force as the 8th uniformed service.

¹⁸ You can also contribute on-line at www.roa.org.