

LAW REVIEW¹ 22061

October 2022

State Agencies Must Comply with USERRA.

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

1.1.1.7—USERRA applies to State and local governments

1.3.2.9—Accommodations for disabled veterans

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Torres v. Texas Department of Public Safety, 142 S.Ct. 2455 (2022).

On 6/29/2022, the United States Supreme Court decided a very important case, cited above. Under this new precedent, State government agencies in Texas and the other 49 States are now subject to being sued in State court for violating the Uniformed Services Employment and Reemployment Rights Act (USERRA), and State courts are required to hear and adjudicate those claims, without regard to State law or State claims of sovereign immunity. This precedent is

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>.

very important because 10% of National Guard and Reserve part-timers (100,000 of 1,000,000) have civilian jobs for State agencies.

On 8/30/2022, I sent the below letter to Texas Lieutenant Governor Dan Patrick, calling upon him, the Governor, and the Attorney General of Texas to comply with USERRA for employees of the State who also serve our country in the Reserve Components of the armed forces. I call upon the readers to send similar letters to your State officials in every State. I call upon State departments and local chapters of the Reserve Organization of America (ROA) to get involved in this vital effort.

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

Lieutenant Governor Dan Patrick
1100 Congress Ave.
Austin, TX 78701

Re: Texas must meet its obligations to wounded veterans in deeds as well as words.

Dear Lieutenant Governor Patrick:

Yesterday, you came to our part of Texas and spoke at the Hippodrome Theater in Waco. You spoke eloquently about the need to provide for our veterans, especially those who were wounded and disabled in the service of our country. Unfortunately, the actions of the Abbott-Patrick-Paxton Administration have been inconsistent with these eloquent words. I invite your attention to *Torres v. Texas Department of Public Safety*, 142 S.Ct. 2455 (2022).

When called upon to comply with the important federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA), Governor Abbott and Attorney General Paxton chose instead to try to hide behind the hoary doctrine of sovereign immunity. Fortunately, they did not get away with it. The United States Supreme Court shot them down, holding that Texas and the other 49 states impliedly consented to being sued for violating laws like USERRA when they ratified the Constitution or joined the Union later.

In 2007, Le Roy Torres was a Captain in the Army Reserve and a Texas state trooper. He was called to active duty and deployed to Iraq, where he was exposed to toxic burn pits smoke. As a result, he suffered from constrictive bronchiolitis, a debilitating lung disease. He was released from active duty and eventually was medically retired from the Army.

Captain Torres returned home to Texas and applied for reemployment at the Department of Public Safety (DPS). He was entitled to reemployment because he met the five USERRA

conditions. He left his civilian job to perform service in the uniformed services, and he gave DPS prior oral and written notice. He did not exceed USERRA's five-year limit on the cumulative duration of his periods of service, and because he was called to active duty involuntarily his Iraq service did not count toward the five-year limit. He served honorably and was released from the period of service without a disqualifying bad military discharge. After release from active duty, he made a timely application for reemployment.

Because of his disability, incurred in the service of our country, Captain Torres could not reasonably return to his pre-service job as a state trooper. Under these circumstances, the employer (the State of Texas) was required to reemploy Captain Torres in another position for which he was qualified, despite his disability, *or for which he could become qualified with reasonable employer efforts*. I invite your attention to section 4313(a)(3) of USERRA, 38 U.S.C. § 4313(a)(3).

For purposes of USERRA, Captain Torres' employer was the State of Texas, not just the DPS. Surely, there must have been a position somewhere within the Government of the State of Texas for which he could have become qualified with reasonable employer efforts. Instead of complying with USERRA, the State of Texas forced Captain Torres to resign from his DPS position.

I am an active life member of the Reserve Organization of America (ROA). Our Executive Director, Major General (Retired) Jeffrey Phillips, twice wrote to Governor Abbott, calling upon him to do right by our member, Captain Torres. Instead, Governor Abbott and Attorney General Paxton chose to blow him off, confident that the Texas courts would hold that sovereign immunity ("the King can do no wrong") precluded Captain Torres from suing to enforce his USERRA rights.

Represented by my good friend attorney Brian Lawler (also a life member of ROA), Captain Torres sued DPS in state court in Corpus Christi. Representing DPS, Attorney General Paxton asserted that DPS enjoyed sovereign immunity and that the lawsuit should be dismissed. The trial court denied the Attorney General's motion to dismiss but permitted DPS to make an interlocutory appeal to Texas' intermediate appellate court, which held that DPS had sovereign immunity and that the case should be dismissed instead of going to trial.

Captain Torres applied to the Texas Supreme Court to review the decision. Our state's high court first agreed to hear the case but then changed its mind and declined to review the decision of the intermediate appellate court.

In the final appellate step available to him, Captain Torres applied to the United States Supreme Court for a writ of certiorari. ROA filed an amicus curiae ("friend of the court") brief in the Supreme Court, urging the Court to grant certiorari, which the Court did on 12/15/2021. ROA

filed a new amicus brief on 2/7/2022, urging the Court to reverse the decision of Texas' intermediate appellate court. Oral argument was held on 3/29/2022, and the excellent decision was released on 6/29/2022, at the end of the Court's 2021-22 term. The Supreme Court remanded the case back to the Texas court system for a trial on the merits.

I call upon the State of Texas to confess error, to pay Captain Torres every last dime that it owes him, and to announce that, going forward, the State of Texas will comply with its legal and moral obligations to those who leave State of Texas jobs to serve our country in uniform. This is exceedingly important because 10% of National Guard and Reserve part-timers (100,000 of 1,000,000) have civilian jobs working for state government agencies.

I voted for you in 2018 and will probably do so again this year, but I will be much more confident in that choice if you back up the commitment to Texas veterans with tangible actions, not just eloquent words.

Very respectfully,

Samuel F. Wright

P.S.: I invite your attention to www.roa.org/lawcenter, where you will find more than 2,000 "Law Review" articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. ROA established this column in 1997, and we add new articles each month. These articles are available for free to everyone, not just ROA members, because there is no toll booth on the road to the Law Review Library. As a sample, I invite your attention to Law Review 22001 (January 2022) and Law Review 22046 (July 2022). For your convenience, I am enclosing a copy of each article.

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 more than 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 eight³ 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 20002⁴

³ Congress recently established the United States Space Force as the 8th uniformed service.

⁴ You can also contribute on-line at www.roa.org.