

LAW REVIEW¹ 23006

January 2023

Has ESGR Not Gotten the Word about the 2021 USERRA Amendment?

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

Subject Index Codes:

1.1.3.3—USERRA applies to National Guard service
1.8—Relationship between USERRA and other laws/policies

Q: I am a Sergeant in the Army National Guard and a member of the Reserve Organization of America (ROA). I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the National Guard and Reserve. In Law Review 21002 (January 2021) and Law Review 23005 (January 2023), you wrote that USERRA was recently amended and that it now applies to *State Active Duty* performed by National Guard members like me.

I was recently called up for 40 days of State Active Duty—called by the Governor, under State authority, paid with State funds, for a State emergency. When I completed my service, I immediately sought to return to my civilian job, working for a large company (let us call it Daddy Warbucks Industries or DWI). The DWI personnel office insisted that USERRA does not

¹ Please see 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, and we add new articles each month. I am the author of more than 90% of the articles published so far, 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 on active duty and in the Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and I currently serve on the Executive Committee and as Chairman of the Membership Committee. I participated in the drafting of USERRA, to replace the 1940 reemployment statute, while employed as an attorney for the United States Department of Labor (DOL). I have also worked with USERRA and the predecessor reemployment statute as a Navy judge advocate, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and as an attorney for the United States Office of Special Counsel (OSC). For six years (June 2009 through May 2015), I was a full-time employee of ROA, serving as the first Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC. My paid ROA employment ended 5/31/2015, but I have continued many of the SMLC functions as a volunteer and ROA member. You can reach me by e-mail at SWright@roa.org.

apply to State Active Duty and that my 40-day absence from work was not protected by law and that I had been fired for unexcused absence.

I contacted the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve or ESGR.³ I asked for ESGR assistance in getting my job back, but the ESGR employee who answered the telephone said: “Sorry, but we cannot help you because your problem with your employer relates to State Active Duty, and we do not have the authority to mediate employer-employee disputes that relate to State Active Duty.”

Is it not true that USERRA was amended, and that State Active Duty is now protected by USERRA under most circumstances?

A: Yes, but that has only been the case since 1/5/2021. On that date, the President signed into law the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.⁴ Section 7004 of this new law amended section 4303(13) of USERRA,⁵ the definition of “service in the uniformed services,” by adding the following to the definition: “State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act,⁶ and State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.”⁷

Because you performed a continuous period of State Active Duty that lasted 14 days or more after 1/5/2021, your civilian job is protected by USERRA. If you met the five USERRA conditions for reemployment, you had the right to reemployment, and refusing to reinstate you promptly violated USERRA. You will need to prove that you met the following conditions:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.⁸
- b. You must have given prior oral or written notice to the civilian employer.⁹
- c. Your cumulative period or periods of uniformed service, with respect to your employment relationship with that employer, must not have exceeded five years.¹⁰

³ The ESGR telephone number is 800-336-4590. The website is www.esgr.mil

⁴ Public Law 116-315, 134 Stat. 4932.

⁵ 38 U.S.C. § 4303(13).

⁶ 50 U.S.C. § 1601 et seq.

⁷ 42 U.S.C. § 5170.

⁸ 38 U.S.C. § 4312(a).

⁹ 38 U.S.C. § 4312(a)(1). If giving prior notice was precluded by military necessity or otherwise impossible or unreasonable, your client was excused from the requirement to give prior notice. 38 U.S.C. § 4312(b).

¹⁰ 38 U.S.C. § 4312(c). Under that subsection, there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting an individual’s five-year limit with respect to an

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.¹¹
- e. After release from the period of service, you must have been timely in reporting back to work or applying for reemployment.¹²

Q: It has now been two years since Congress amended USERRA and expanded the law's reach to include State active duty. Has ESGR not gotten the word?

A: ESGR is very much aware of this 2021 amendment to USERRA and has mentioned it on its website. The problem is that, as a matter of federal fiscal law, ESGR lacks the authority to expend federal funds to assist National Guard members whose problems with their civilian employers arise out of State Active Duty. On its website, ESGR states:

As a federally funded program, ESGR can provide education for state funded uniformed service; however, ESGR cannot expend resources mediating State Active Duty related disputes."¹³

The ESGR statement about the limitation on its own authority is correct as a matter of federal fiscal law. The Supreme Court has held that the power to authorize and appropriate federal funds is vested exclusively in Congress. No money shall be spent without a specific Congressional appropriation.¹⁴ The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.¹⁵

Q: What is the solution?

A: The answer is to get Congress to enact a simple provision expanding the authority of ESGR to include mediating disputes between civilian employers and National Guard members about State Active Duty. It is unfortunate that the Fiscal Year 2023 National Defense Authorization Act did not include such a provision.

employer relationship. *See generally* 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.

¹¹ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offenses) and other-than-honorable administrative discharges.

¹² After a period of service that lasted more than 30 days but fewer than 181 days, the service member is required to apply for reemployment within 14 days after the date of release. 38 U.S.C. § 4312(e)(1)(C).

¹³ See <https://www.esgr.mil/USERRA/USERRA-and-State-Active-Duty>.

¹⁴ United States Constitution, Article I, section 9, clause 7.

¹⁵ See *United States v. MacCollum*, 426 U.S. 317, 321 (1976).

Please join or support the Reserve Organization of America (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, and we add new articles 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national 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, ESGR volunteers, DOL investigators, 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 their membership status, or lack thereof, in our organization, but please understand that ROA members, through their dues and contributions, pay the cost of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any of our country’s eight uniformed services,¹⁶ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.¹⁷ Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve.

If you are eligible, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

Reserve Organization of America
1 Constitution Avenue NE
Washington, DC 20002¹⁸

¹⁶ Congress recently created the United States Space Force as the 8th uniformed service.

¹⁷ If you are under the age of 35, you can become an associate member for free for five years or until you turn 35, whichever comes first.

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