

LAW REVIEW¹ 23008

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USERRA Precludes Suits Initiated by Employers

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Subject Index Codes:

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- 1.3.1.1—Left job for service and gave prior notice
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Q: My son (age 20) recently enlisted in the Army and will report to basic training in early March 2023. My son gave his employer (the owner of a small diner with only ten employees) notice that he will be leaving the job in early March to report to basic training as ordered, and the employer reacted angrily to the notice. My son is one of only two cooks in this 24-hour diner, and the owner is concerned about finding another cook. My son told me that it is unlikely that he will want to return to the diner after he leaves active duty, but he wants to keep the job behind him as an “unburned bridge” in case he cannot find a better job when he completes his initial active-duty obligation in four years.

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 took part 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.

I am a retired Army Reserve Colonel 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) and other laws that are especially pertinent to those who serve our country in uniform. The articles that I read were about applying USERRA to service members in the National Guard and Reserve. Does USERRA also apply to individuals (like my son) who leave civilian jobs to enlist in the Active Component of the Army or another armed force?

A: Yes. As I have explained in Law Review 15116 (December 2015) and many other articles, USERRA applies to any person who meets five simple conditions:

- a. Left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which the person seeks reemployment.
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.⁴
- e. After release from the period of service, has made a timely application for reemployment.⁵

A person who meets these five conditions is entitled to prompt reinstatement in the job that he or she would have attained if he or she had remained continuously employed by the civilian employer, or another job (for which he or she is qualified) that is of like seniority, status, and pay.⁶ Upon reemployment, the person is entitled to be treated as if he or she had been continuously employed, for seniority and pension purposes in the civilian job.⁷

Your son is entirely correct in treating his job at the diner as an “unburned bridge”—he is not required to decide now (as he leaves the job to enter active duty) that he will want to return to

³ In 2018, the members of the Reserve Officers Association amended the organization’s constitution and made all past and present uniformed services personnel (E-1 through O-10) eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name “Reserve Organization of America” (ROA) to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

⁴ Disqualifying bad discharges include bad conduct discharges and dishonorable discharges (awarded by court martial for serious offenses) and other-than-honorable administrative discharges. 38 U.S.C. 4304.

⁵ After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁶ 38 U.S.C. § 4313(a)(2)(A).

⁷ 38 U.S.C. § 4316(a), 4318.

the job when he leaves active duty. The pertinent paragraph of USERRA's legislative history is as follows:

The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the service member's civilian job as an "unburned bridge." Not until the individual's discharge or release from service and/or transportation back home, which triggers the application time, does the service member have to decide whether to recross that bridge. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946): "He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life.⁸

Section 4331 of USERRA gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers.⁹ The pertinent section of the USERRA Regulations 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.¹⁰

If your son meets the five USERRA conditions, he will have the right to reemployment in his job at the diner, notwithstanding his refusal to predict, at the time he left the job, that he would return to work at the diner after his release from active duty.

⁸ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in full in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 809 of the 2021 edition of the *Manual*.

⁹ 38 U.S.C. § 4331.

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

Q: The owner of the diner insists that USERRA does not apply to him because he has fewer than fifteen employees. What do you say about that?

A: Other federal statutes, like the Fair Labor Standards Act, only apply to employers with fifteen or more employees, but the federal reemployment statute has never had a threshold based on the size of the enterprise or the number of employees. You only need one employee to be an “employer” for purposes of the reemployment statute.¹¹

Q: The owner of the diner has threatened to hire a lawyer and sue my son, seeking a declaratory judgment to the effect that my son will not have the right to reemployment upon release from active duty. What do you say about that?

A: Such a lawsuit will be swiftly dismissed because USERRA provides: “An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).”¹²

The purpose and effect of section 4323(f) is explained in the legislative history as follows:

Section 4322(d)(5) [later renumbered as 4323(f)] would provide that only persons claiming rights or benefits under chapter 43 [USERRA] may initiate an action, i.e., no declaratory judgment actions by employers, prospective employers, or other entities (such as pension plans or unions) can be filed.¹³

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

¹¹ See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992). See generally Law Review 17127 (December 2017).

¹² 38 U.S.C. § 4323(f). The final sentence of subsection (a)(1) provides: “In the case of such an action [to enforce USERRA] against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.” 38 U.S.C. § 4323(a)(1). See generally Law Review 22072 (November 2022).

¹³ H.R. Rep. No. 103-65, pt. 1 (1993), reprinted in KATHRYN PISCITELLI & EDWARD STILL, THE USERRA MANUAL: UNIFORMED SERVICES EMPLOYMENT & REEMPLOYMENT RIGHTS app. D-1, at 827 (2021 ed.).

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 supply 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,¹⁴ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.¹⁵ 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:

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¹⁴ Congress recently created the United States Space Force as the eighth uniformed service.

¹⁵ If you are under the age of thirty-five, you can become an associate member for free for five years or until you turn thirty-five, whichever comes first.

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