

LAW REVIEW¹ 23012

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Enforcing USERRA against a Local Government

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Subject Index Codes:

1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Q: I am an Air Force Reserve Lieutenant Colonel and a life member of the Reserve Organization of America (ROA).³ I have read with great interest 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.

I am particularly interested in your Law Review 23011, about enforcing USERRA against a private employer. I am a public-school teacher, and my employer is a local government entity—let us call it the Harper Valley Independent School District or HVISD. Recently, I was

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.

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.

away from my civilian job for military duty for exactly one year, from 1/1/2021 until 12/31/2021. I made a timely application for reemployment on 1/3/2022, well within the 90-day deadline for applying, after my release from active duty.⁴ I have read and reread your Law Review 15116 (December 2015), and I am confident that I met the five conditions for reemployment under USERRA.

Nonetheless, the school district refused to reemploy me until 8/1/2022, the start of the 2022-23 academic year. As a result, I lost six months of pay and valuable civilian pension credit. I believe that the school district violated my USERRA rights, and I want to initiate a legal proceeding to enforce my rights. In Law Review 23011, you described the enforcement mechanism for a USERRA claim against a private employer. Is the enforcement mechanism the same for a claim against a local government?

A: Yes. The enforcement mechanism against a local government is the same as the enforcement mechanism against a private employer. The final subsection of section 4323 of USERRA is as follows: “In this section [for purposes of USERRA enforcement], the term ‘private employer’ includes a political subdivision of a State.”⁵ The term “political subdivision of a State” has been defined as follows: “ ‘Political subdivision means a county, city, town, or other municipal corporation, a public authority, and generally any publicly-owned entity that is an instrumentality of a State or of a municipal corporation.’⁶ Local school districts like the HVISD clearly qualify as political subdivisions.

Q: The General Counsel of the HVISD insisted that it was “impossible” to reemploy me in January 2022, in the middle of the 2021-22 academic year, because the district had no teacher vacancies at that time and, under school district policy going back more than a century, it is not permissible to replace a teacher in the middle of an academic year if the incumbent teacher is qualified and available. She also insisted that displacing the incumbent teacher of the class that I had been teaching would violate the collective bargaining agreement between the school district and the union that represents the district’s teachers. What do you say about that?

A: Under USERRA and the predecessor reemployment statute that was in effect before Congress enacted USERRA in 1994, a returning service member or veteran who meets the eligibility criteria must be reemployed in the appropriate position of employment *even if that means displacing another employee*. In a case involving a Department of Veterans Affairs (VA) chaplain who sought reinstatement to the position of chief chaplain at a specific VA medical

⁴ 38 U.S.C. § 4312(e)(1)(D).

⁵ 38 U.S.C. § 4323(i).

⁶ 12 C.F.R. § 1.2(i) (2019).

center, after returning from three years of active duty, the United States Court of Appeals for the Federal Circuit⁷ held:

The department [VA] first argues that, in this case, Nichols' [the returning veteran and plaintiff] former position was "unavailable" because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. "Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who "left private life to serve their country."

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946). *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable, and it is irrelevant that the department would be forced to displace Walsh to restore him.⁸

Under section 4302 of USERRA, this law is a floor and not a ceiling on the employment and reemployment rights of those who serve or have served our country in uniform. Section 4302 provides:

Nothing in this chapter [USERRA] shall supersede, nullify, or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person under this chapter.⁹

This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in

⁷ The Federal Circuit is the specialized Federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from Merit Systems Protection Board (MSPB) decisions.

⁸ *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1994). See also *Rivera-Melendez v. Pfizer Pharmaceutical LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013); *Ryan v. Rush-Presbyterian-St. Luke's Medical Center*, 15 F.3d 697 (7th Cir. 1994); *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communications Technologies, Inc.*, 460 F. Supp. 2d 700, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part and reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981); *Jennings v. Illinois Department of Education*, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978), judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Muscanere v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973). Please note that three of these published cases involve public-school teachers.

⁹ 38 U.S.C. § 4302(a).

any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the enjoyment of any such benefit.¹⁰

State law, school district policy, or the CBA between the school district and the union can give you *greater or additional rights*, but these things cannot take away your federal statutory rights under USERRA. In its first case construing the 1940 reemployment statute, the Supreme Court held: “No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act.”¹¹

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, and we add new articles each month.

ROA is more than a century old—on 10/1/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization in a meeting held at the historic Willard Hotel in Washington, DC. 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,¹² you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.¹³ Enlisted personnel as well as officers are eligible for full membership, and

¹⁰ 38 U.S.C. § 4302(b).

¹¹ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (emphasis supplied).

¹² Congress recently created the United States Space Force as the 8th uniformed service.

¹³ If you are under the age of 35, you can become an associate member for free for five years or when you turn 35, whichever comes first.

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