

LAW REVIEW¹ 23036

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Military Spouses Do Not Have Reemployment Rights under USERRA, But Congress May Change that.

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

1.1.3.9—Military family members

1.2—USERRA forbids discrimination

1.8—Relationship between USERRA and other laws/policies

5.5—Other military service and family obligations

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 (VRRRA—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 VRRRA 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 VRRRA 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>.

Spouses of military personnel suffer from serious problems in finding and holding civilian jobs and maintaining careers.³ A big part of the problem is that a career active-duty service member can expect to be transferred approximately once every three years, and that usually necessitates the non-military spouse giving up his or her civilian job and having to look for a new job in a distant state.

State licensing requirements, which are often nonportable between states, complicate the problem of continuing in one's professional career after moving from State A to State B accompanying the spouse who is a career active-duty service member. As a result of very recently enacted federal legislation, professional licenses (other than law licenses) are now portable between states in this scenario.⁴

Congress has considered other approaches to this problem, including tax benefits for employers who hire military spouses, preference for military spouses in federal civilian employment, etc. Recently, it has been suggested that the Uniformed Services Employment and Reemployment Rights Act (USERRA) might be amended to expand the reemployment provision and the prohibition of discrimination to include spouses of Active Component or Reserve Component personnel.

As of this writing, there is no bill pending in the 118th Congress (2023-24) to amend USERRA in this way, but the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS)

³ See "Nearly a third of military spouses are jobless. What is being done to help?", <https://www.militarytimes.com/pay-benefits/family-life/2022/02/11/nearly-a-third-of-military-spouses-are-jobless-whats-being-done-to-help/>.

⁴ On 1/5/2023, President Biden signed into law the Veterans Auto and Education Relief Act of 2022, Public Law 117-333, 136 Stat. 6121. That new law includes the Military Spouse Licensing Relief Act. See generally "Military Spouses Can Transfer Professional Licenses or Certificates During Military Moves (Except Lawyers)," Law Review 23019 (April 2023).

included this proposal and enforcement of it in its Fiscal Year 2024 budget justification document and the Office of Management and Budget (OMB) approved this proposal. I congratulate Assistant Secretary James Rodriguez and DOL-VETS for this initiative. On 5/11/2023, DOL-VETS conducted a two-hour panel discussion on military spouse employment issues, including the proposal to expand USERRA.⁵

Right to Reemployment after a period of service

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, an individual must meet five simple conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian job (federal, state, local, or private sector to perform “service in the uniformed services” as defined by USERRA.⁶
- b. Must have given the employer prior oral or written notice, or an “appropriate officer” of the uniformed service must have given prior notice on the individual’s behalf.⁷
- c. The individual’s cumulative period of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years.⁸

⁵ See “Panel: Military Spouse Appreciation Day-Protecting Milspouses in the Workplace,” <https://www.dol.gov/agencies/vets/events/05112023/panel-military-spouse-appreciation-day-protecting-milspouses/>. During the program, the Honorable James Rodriguez, the Assistant Secretary of Labor for Veterans’ Employment and Training, suggested: “USERRA could be amended to protect military spouses for their own employment absences due to their service member’s service.”

⁶ 38 U.S.C. § 4312(a).

⁷ 38 U.S.C. § 4312(a)(1).

⁸ 38 U.S.C. § 4312(c). There are nine exemptions—that is, there are nine kinds of service that do not count toward exhausting the individual’s five-year limit. *Id.* See *generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit.

- 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

Section 4303 of USERRA defines 17 terms used in this law. The term “service in the uniformed services” is defined as follows:

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, 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, 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, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, a period for which a person is absent from a position of employment due to an appointment into service in the Federal

⁹ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious offenses, and “other-than-honorable” administrative discharges.

¹⁰ After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D).

Emergency Management Agency as intermittent personnel under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.¹¹

To address the military spouse employment issue, I propose that Congress add the following language to the end of section 4303(13):

The term “service in the uniformed services” also includes, in the case of the spouse of an Active Component or Reserve Component service member, a period of absence from a civilian position of employment necessitated by the uniformed service of the spouse who is a service member. The term “necessitated by the service” shall include the deployment or transfer of the service member spouse to a distant location, and it shall also include circumstances where the service member’s entry on active duty or deployment to a distant location makes it necessary for the nonmilitary spouse to leave his or her civilian position of employment to care for dependent children. The term also includes other circumstances when the entry on active duty or deployment or transfer to the service member makes it necessary for the nonmilitary spouse to leave his or her civilian position of employment.

Section 4311 of USERRA makes it unlawful for an employer (federal, state, local, or private sector) to discriminate in employment against any person or to deny the person initial employment, reemployment,

¹¹ 38 U.S.C. § 4303(13).

retention in employment, promotion, or benefit of employment on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service, or on the basis of the person having exercised a USERRA right, participated in a USERRA investigation, or having taken an action to enforce the USERRA rights of any person. Section 4311 provides:

(a) 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.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.¹²

I propose that Congress amend USERRA by adding references to the military spouse scenario in section 4311(a), section 4311(b), and section 4311(c).

¹² 38 U.S.C. § 4311.

Real-life scenarios where this proposed new language would have been most helpful:

I am aware of two real-life scenarios where this proposed new language would have been most helpful. One scenario resulted in a published court decision. The other scenario did not result in a court decision or lawsuit, but it did result in a “Law Review” article by ROA.

***Norris v. Glassdoor, Inc.*, 2018 U.S. Dist. LEXIS 117043, 2018 WL 3417111 (S.D. Ohio July 13, 2018).¹³**

Stacy Norris (SN), the plaintiff, enlisted in the Navy in 1997 and served on active duty for exactly four years, from 9/23/1997 until 9/23/2001. After she left active duty, she did not affiliate with the Navy Reserve or any other Reserve Component, and she was a member of the Individual Ready Reserve (IRR) until 9/23/2005, when she completed her eight-year obligation and was honorably discharged. She was hired by Glassdoor (GD) in 2007.

SN’s husband was a service member. The decision does not make clear whether he was a member of the Active Component (AC) or the Reserve Component (RC), and the decision does not say that he was in the Navy or some other service. USERRA applies just the same in either case.

In 2011, SN’s husband was deployed to Virginia Beach, Virginia for two years, and SN accompanied her husband to his new duty station. SN asked GD for permission to remain employed by the company and to

¹³ This is a decision by Judge Algenon L. Marbley of the United States District Court for the Southern District of Ohio.

do her work remotely from her new home in Virginia, but the company declined that request. Accordingly, SN reluctantly resigned from her position with the company.

In 2013, the husband completed his two-year deployment to Virginia and the couple returned to Ohio. SN contacted GD and requested reinstatement. The company did not respond to her request, and she did not return to work for the company. SN retained an attorney and sued GD in the appropriate federal district court. She contended that USERRA entitled her to reinstatement under these circumstances, and she also claimed that GD had violated section 4311 of USERRA, based on her own prior service in the Navy.

GD filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that SN was not entitled to relief that the court could award even if all her factual assertions were accepted as true. Judge Marbley granted the motion.

Judge Marbley held (correctly based on the language of USERRA as enacted) that USERRA does not provide for reemployment for a military spouse who left her civilian job to accompany her service member spouse to a distant duty location. Judge Marbley also dismissed SN's section 4311 claim because SN had not credibly alleged that GD's refusal to reinstate her in 2013 was *motivated by* SN's own Navy service from 1997 to 2005, before she began her GD employment.

If the language that I have proposed were to be enacted, a person in this situation would have the right to reemployment.¹⁴

¹⁴ I recognize that most spouses of active-duty career service members will not benefit from such a provision. In the *Norris* case, the service member and his spouse returned to the same metropolitan area after the period of service. In most cases, the career service member and spouse will move from State A to State B and then on to

The military spouse is deploying, so the non-military spouse must take leave from his or her civilian job to care for dependent children alone.

In Law Review 22029 (May 2022), I addressed a real-life situation that did not result in a lawsuit and a published court decision. The situation involved a Navy Reserve Lieutenant (O-3) with a wife and three children under the age of seven. Both the Lieutenant and his wife worked outside the home. That was possible because they shared the childcare responsibilities.

The Lieutenant was notified by the Navy that he was being called to active duty for one year and that he would be deployed outside the United States. Their plan was that the wife would take “military leave” for one year so that she alone could bear the childcare responsibilities while the Lieutenant was deployed. They were under the impression that USERRA gave the wife the right to unpaid but job-protected leave from her job under these circumstances.

When I informed the Lieutenant that USERRA does not protect his wife’s right to leave her job and return after his deployment, he was most disappointed. Ultimately, the wife found it necessary to resign from her civilian job one year short of vesting in the employer’s pension plan, and after her husband’s deployment she had to start over the process of earning a pension, with a new employer.

State C, not back to State A. In most cases, they will not be able to return to State A within the five-year limit under USERRA.

Ensuring that military spouses have the opportunity to have civilian jobs and careers is a national security imperative.

As First Lieutenant Tara C. Buckles, USMCR and I explained in detail in Law Review 23001 (January 2023), all the services, especially the Army, have fallen short of their recruiting goals in the last two years. This is the most challenging recruiting situation that the services have faced since Congress abolished the draft and established the All-Volunteer Military half a century ago.¹⁵ Expanding USERRA to include military spouses is necessary to ensure our national defense.

If a military marriage is to last, the nonmilitary spouse will need to accompany the military spouse whenever it is possible to do so. Under current law, the nonmilitary spouse must often choose between having a career and continuing the marriage. This tension all too often results in divorce, and divorce results in depression and all too often suicide.

Many military personnel, especially junior enlisted personnel, do not earn enough from the military to provide a decent standard of living for a family. If the nonmilitary spouse is unable to find and hold suitable employment, the result is privation for the family.

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. We add new articles each month.

¹⁵ The last involuntary inductee reported to basic training in June 1973.

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” 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 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 advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, DOL investigators, Employer Support of the Guard and Reserve (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 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 one of our nation’s eight¹⁶ 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,

¹⁶ Congress recently established the United States Space Force as the eighth uniformed service.

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 20002¹⁷

On 5/11/2023, the Veterans' Employment and Training Service of the Department of Labor (DOL-VETS) conducted a two-hour panel discussion on the proposal to expand USERRA to protect the civilian jobs of military spouses. Here is a link to that recorded presentation:

<https://www.dol.gov/agencies/vets>

¹⁷ You can also contribute on-line at www.roa.org.