

LAW REVIEW¹ 23044

August 2023

Enforcing USERRA Pension Rights against a State Agency Employer By Captain Samuel F. Wright, JAGC, USN (Ret.)²

Subject Index Codes:

1.1.1.7—USERRA applies to state and local governments.

1.3.1.2—Character and duration of service

1.3.2.3—Pension credit for service time

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

3.0—Reserve retirement and civilian employment

Q: I am a retired Army Reserve Colonel³ and a life member of the Reserve Organization of America (ROA).⁴ I have read with great

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 The factual set-up for this article is hypothetical but realistic.

⁴ 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”

interest many 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.

I was born in 1962, and I graduated from college in 1984. While in college, I participated in the Army’s Reserve Officers Training Corps (ROTC), and when I graduated on May 15, 1984, I was commissioned a Second Lieutenant. I remained on full-time active duty for exactly five years, until May 1989, when I was released from active duty and affiliated with the Army Reserve. In July 1989, just weeks after I left active duty, my local school district hired me as a teacher, and I have served a career as a high school mathematics teacher.

I have worked continuously for the school district since 1989, but my teaching career was interrupted several times for military training and service. I performed drill weekends every month and annual training every year until I retired from the Army Reserve in May 2014. Three times, I was involuntarily recalled to active duty for service in Southwest Asia, in 1990-91, 2003-04, and 2009-10. I volunteered to return to active duty for 24 months in 2011-13.

When I was hired in July 1989, I was offered the opportunity to purchase teacher retirement credit for my five years of active duty, from 1984 to 1989, and I took advantage of that opportunity. I was given teacher retirement credit for that five-year period, and I was under the impression that I have also been credited with teacher

retirement credit for all the additional periods when I have been away from work for military service and training.

I am planning to retire from my teaching career at the end of the 2023-24 school year, and I have already started working with the personnel department of the local school district and with the state agency (headquartered in our state capital) that administers the teacher retirement system for all school districts in our state. After having read many of your “Law Review” articles, I believe that I am entitled to 35 years of teacher retirement credit, from July 1989 (the start of the 1989-90 school year) until July 2024 (the end of the 2023-24 school year). With 35 years of teacher retirement credit, I am entitled to immediate receipt of the full retirement benefit.

I have read and reread your Law Review 15116 (December 2015). I met and I am prepared to document that I met the five USERRA conditions for reemployment for each short or long period of time that I have been absent from my teaching job for military training or service during the entire time (1989-2014) that I was employed by the school district and serving in the Army Reserve. Of course, I have performed no military training or service after I retired from the Army Reserve in May 2014, 30 years after I was commissioned a Second Lieutenant in May 1984.

An attorney for the Teacher Retirement System (TRS) told me that, under our state law, there is an absolute limit of five years on the amount of military service credit that a teacher can receive for retirement purposes. He said that I used up that five-year limit in 1989 when I purchased credit for my 1984-89 active-duty period.

The TRS attorney told me that the personnel department of my school district added up all the school days that I missed because I was “playing soldier” in the Army Reserve, and that figure added up to exactly seven years. The TRS attorney told me that I am entitled to only 28 years of teacher retirement credit, not 35 years. Under his computation, the amount of my monthly TRS retirement check, starting in July 2024 (when I retired) will be 30% less than the figure I claim, based on 35 years of teacher retirement credit.

Have the school district and the TRS violated my USERRA rights?

Answer, bottom line up front

Yes, the school district and the state agency that administers the teacher retirement system have violated USERRA, and you should sue both entities, if they refuse to comply with this law. Under section 4302(b) of USERRA,⁵ and under the Supremacy Clause of the United States Constitution,⁶ the federal reemployment statute (USERRA) trumps limitations imposed by state laws, local ordinances, collective bargaining agreements, and employer policies or practices.

There is no five-year limit on the amount of civilian pension credit that an employer must grant to an employee whose career with that employer was interrupted by voluntary or involuntary military service or training. There is a five-year cumulative limit on the duration of the periods of uniformed service that an individual can perform, related to the employer relationship for which he or she seeks reemployment, *but*

⁵ 38 U.S.C. § 4302(b).

⁶ United States Constitution, Article VI, Clause 2.

there are nine exemptions (kinds of service that do not count toward exhausting an individual's five-year limit).⁷

You met the five USERRA conditions, including the five-year limit, for each period when you were away from work between July 1989 (when you began your teaching career) and May 2014 (when you retired from the Army Reserve). Accordingly, you are entitled to teacher retirement credit for the entire 35-year period that you worked for the school district as a teacher. Thus, you are entitled to the full teacher retirement benefit, based on 35 years of teacher service. Do not let the school district and the TRS deprive you of 30% of the benefit to which you are entitled.

Explanation

The five USERRA conditions for reemployment

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

- a. You must leave a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.⁸
- b. You must have given the employer prior oral or written notice.⁹
- c. Your cumulative periods of uniformed service, relating to the employer relationship for which you seek reemployment, must

⁷ See 38 U.S.C. § 4312(c). See 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 with respect to a specific employer relationship.

⁸ 38 U.S.C. § 4312(a).

⁹ 38 U.S.C. § 4312(a)(1).

not have exceeded five years.¹⁰ I will discuss this condition in detail, below.

- 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 made a timely application for reemployment.¹²

Q: The personnel department of the local school district said that they added up all the school days that I missed to “play soldier” (as they call it) during my lengthy career as a teacher. The personnel department said that I missed 2,920 school days, or eight years, and that I am well beyond the five-year limit. What do you say about that?

A: The school district is wrong. First, it is the *cumulative period of uniformed service, not the period of absence from the civilian job, which counts toward the five-year limit* (assuming that the period of service is not exempt from the five-year limit under one of the subsections of section 4312(c) of USERRA).¹³

The period of absence from the civilian job is usually at least a few days longer than the period of uniformed service. For example, let us assume that you were on active duty for exactly two years, from 10/1/2011 until 9/30/2013. Let us assume further that the period of service was not exempt from the five-year limit.

¹⁰ 38 U.S.C. § 4312(c).

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

¹² After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

¹³ See Law Review 23022 (May 2023).

Let us assume that you left your civilian job with the school district on 9/15/2011, 15 days before the start of your active-duty period. After your active duty ended on 9/30/2013, you waited 60 days to apply for reemployment. You were away from your job for two years and 75 days, but only the two-year period of active duty counts toward your five-year limit.

Second, section 4312(c) of USERRA sets forth nine exemptions—kinds of service that do not count toward exhausting your five-year limit with the school district, and most of the service that you have performed is exempt. Your two periods of involuntary active duty, in 2003-94 and 2009-10, do not count toward exhausting your five-year limit with the school district.¹⁴ Your drill weekends and annual training periods and your attendance at the Army War College are exempt from the five-year limit.¹⁵ Your five years of initial active duty, from May 1984 until May 1989, before you began your teaching career, are exempt from the computation of your five-year limit.¹⁶

Q: I was involuntarily called to active duty for seven months, in 1990-91, for Operation Desert Shield/Storm. Does that period count toward my five-year limit under USERRA?

A: No.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue update of and replacement for the Veterans' Reemployment Rights Act (VRRA), which Congress

¹⁴ 38 U.S.C. § 4312(c)(4)(A).

¹⁵ 38 U.S.C. § 4312(c)(3).

¹⁶ 38 U.S.C. § 4312(c)(3).

enacted in 1940. Most USERRA provisions went into effect 60 days after the date of enactment, on 12/12/1994.

Under the VRRA, there was a four-year limit on the duration of the period of service, related to the employer relationship for which the person sought reemployment. Under the transition rules, a period of uniformed service performed prior to 12/12/1994 is exempt from USERRA's five-year limit if it was exempt from the VRRA's four-year limit.¹⁷ Your involuntary service for Operation Desert Shield/Storm was exempt from the four-year limit under the VRRA, so it is also exempt from the five-year limit under USERRA.

Q: How much of my five-year limit have I exhausted?

A: You have exhausted exactly two years of your five-year limit. Your two-year period of voluntary active duty, in 2011-13, counts toward your limit. All your other military service and training periods are exempt. You are well within the five-year limit.

Q: What does USERRA provide about my rights with respect to my civilian pension for the periods when I was away from my civilian job for services in the uniformed services?

A: USERRA provides: "Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of

¹⁷ See Law Review 13037b (March 2013).

benefits under the plan.”¹⁸ This means that your teacher retirement pension must be computed *as if you had remained continuously employed by the school district* for the entire time (July 1989 until July 2024) that you were employed by the school district. The short and extended periods that you were away from your job for military training or service did not interrupt your continuous accrual of TRS pension credit.

Also pertinent is this section of title 10 of the United States Code:

No period of service included wholly or partly in determining a person’s right to or the amount of retired pay under this chapter [chapter 1223—retired pay for nonregular service] may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, on account of civilian employment by the United States or otherwise, or for determining the amount payable under that law, if that service is otherwise properly credited under it.¹⁹

Q: Do I need to sue the local school district, or do I need to sue the Teacher Retirement System (TRS), the State agency that administers teacher retirement for all school districts in the State?

A: You need to sue both entities, because each has control over actions that they need to take to comply with USERRA. The local school district

¹⁸ 38 U.S.C. § 4318(a)(2)(B). You can find the entire text of section 4318 of USERRA quoted in Law Review 22036 (June 2022) and other articles. Section 4318 applies to defined benefit pension plans as well as defined contribution plans. It applies to pension plans maintained by private employers as well as the Federal Government, the States, and the political subdivisions of States, including local school districts.

¹⁹ 10 U.S.C. § 12736. *See also Cantwell v. County of San Mateo*, 631 F.2d 631 (9th Cir.), cert. denied, 450 U.S. 998 (1980); *Almeida v. Retirement Board of the Rhode Island Employees Retirement System*, 116 F. Supp. 2d 269 (D.R.I. 2000); Law Review 21 (December 2000).

and the TRS are your “joint employers,” and each is responsible for complying with USERRA.²⁰

The TRS is a state agency and is “an arm of the State.” The school district is a local government and is “a political subdivision of the State.” This distinction makes a difference in where you must file the suit.

Q: How do I go about suing TRS and the local school district?

A: There are two ways. First, you can file a formal, written USERRA complaint against the school district and TRS with the Veterans’ Employment and Training Service of the Department of Labor (DOL-VETS), under section 4322(a) of USERRA.²¹ After DOL-VETS completes its investigation of your complaint, the agency will advise you of the results of the investigation.²² At that point, you can insist that DOL-VETS refer your case to the United States Department of Justice (DOJ).²³ If DOJ is satisfied that you are entitled to the benefits you seek, it may take on your case and file suit on your behalf.²⁴ Second, if DOJ turns down your request for representation, or if you choose not to seek DOJ representation, you may file suit on your own behalf.²⁵

Q: In whose name is the suit filed?

A: If DOJ sues TRS, a state agency, it will do so in the name of the United States, as the plaintiff in the action.²⁶ If DOJ sues the school district, a political subdivision, it will do so in your name because

²⁰ See Law Review 23005 (February 2023).

²¹ 38 U.S.C. § 4322(a).

²² 38 U.S.C. § 4322(e).

²³ 38 U.S.C. § 4323(a).

²⁴ 38 U.S.C. § 4323(a).

²⁵ 38 U.S.C. § 4323(a). You can also bypass DOL-VETS altogether and retain a lawyer to sue the school district and the TRS.

²⁶ 38 U.S.C. § 4322(a) (final sentence).

political subdivisions are treated as private employers for purposes of USERRA enforcement.²⁷ If you file suit through private counsel that you retain, you will be the named plaintiff.

Q: Where is the suit filed?

A: If DOJ files suit on your behalf, it will do so in the United States District Court for the district where the school district is located.²⁸ If you are filing the suit through retained private counsel, you will need to sue TRS, a state agency, in the “State court of competent jurisdiction, in accordance with the laws of the State.”²⁹

Q: If I proceed with private counsel and prevail, can I get the court to order the employer to pay my attorney fees?

A: Yes.³⁰ But if you lose you will not be required to pay court costs or the attorney's fees of the defendant employer.³¹

Q: Can I represent myself in a USERRA lawsuit against my employer?

A: Yes, but I do not recommend that you do that. Abraham Lincoln said: “A man who represents himself has a fool for a client.”

Q: If we win, what relief is available?

A: USERRA provides:

In any action under this section, the court may award relief as follows:

²⁷ 38 U.S.C. § 4323(i).

²⁸ 38 U.S.C. § 4323(c)(3). A political subdivision of a State is treated as a private employer for purposes of USERRA enforcement. *See* 38 U.S.C. § 4323(i).

²⁹ 38 U.S.C. § 4323(b)(2). *See also* Law Review 23013 (March 2023).

³⁰ 38 U.S.C. § 4323(h)(2).

³¹ 38 U.S.C. § 4323(h)(1).

- (A) The court may require the employer to comply with the provisions of this chapter.
- (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
- (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.³²

This means that the court will order the school district and TRS to comply with USERRA. You need injunctive relief against both entities to ensure that you receive your full pension entitlement.

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 10/2/1922, a group of veterans of “The Great War,” as World War I was then known, established ROA. General of the Armies John J. Pershing, the commander of our country’s military forces in that war, invited reserve officers who had served under him to attend a meeting at Washington’s historic Willard Hotel. General Pershing and the reserve officers who attended the meeting at his invitation recognized that calling the recently concluded war “the

³² 38 U.S.C. § 4323(d)(1).

“war to end all wars” was a dangerous conceit and that our nation needed to maintain military readiness.

One of the founders 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,³³ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.³⁴ Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the

³³ Congress recently created the United States Space Force as the 8th uniformed service.

³⁴ 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.

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 20002³⁵

³⁵ You can also contribute on-line at www.roa.org.