

LAW REVIEW¹ 23050

September 2023

ROA Drafts and Files Amicus Curiae Brief in the Washington State Supreme Court Supporting the Claims of a Washington State Patrol Officer who Is an Army Reservist and of all others Similarly Situated.

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

1.1.1.7—USERRA applies to state and local governments.

1.2—USERRA forbids discrimination.

1.3.2.10—Furlough or leave of absence clause.

1.8—Relationship between USERRA and other laws/policies.

2.0—Paid military leave for government employees who are Reserve Component service members.

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 (VRRA—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 VRRA 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 VRRA 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>.

On 7/31/2023, the Reserve Organization of America (ROA), the only national military organization that exclusively supports the Reserve Components of our country's armed forces and the individuals who serve in those components, filed an *amicus curiae* ("friend of the court") brief in the Washington State Supreme Court supporting a generous interpretation of section 38.40.060 of the Revised Code of Washington (RCW) concerning the right to *paid military leave* for employees of the State of Washington and its political subdivisions (counties, cities, and other units of local government) who also serve part-time in the Reserve Components (RC) of the armed forces, including the Army National Guard and Air National Guard. You can find a link to the brief at the bottom of this article.

Thank you to Scott Felder, Lukman Azeez, Michael Showalter and Leah Deskins of Wiley Rein, LLP of Washington D.C., for their excellent pro bono (no fee) work on behalf of ROA and all those who serve our country in uniform. Several times per year, ROA files *amicus* briefs in the United States Supreme Court and other courts supporting the rights and interests of those who serve our country in uniform.

Q: How did this case come about?

A: Barbara Werner was a Major in the Army Reserve, and a member of ROA. On the civilian side, she is a Trooper for the Washington State Patrol (WSP), the principal state police force for the State of Washington. This case concerns Washington's paid military leave benefit for public employees and the Washington State Patrol's policy of unlawfully depriving state troopers of it.

Section 38.40.060 of the RCW provides as follows:

(1) Every officer and employee of the state or of any county, city, or other political subdivision thereof who is a member of the Washington national guard or of the army, navy, air force, coast guard, or marine corps reserve of the United States, or of any organized reserve or armed forces of the United States shall be entitled to and shall be granted military leave of absence from such employment for a period not exceeding twenty-one days during each year beginning October 1st and ending the following September 30th in order that the person may report for required military duty, training, or drills including those in the national guard under Title 10 U.S.C., Title 32 U.S.C., or state active status.

(2) Such military leave of absence shall be in addition to any vacation or sick leave to which the officer or employee might otherwise be entitled, and shall not involve any loss of efficiency rating, privileges, or pay.

(3) During the period of military leave, the officer or employee shall receive from the state, or the county, city, or other political subdivision, his or her normal pay.

(4)

(a) *The officer or employee shall be charged military leave only for days that he or she is scheduled to work for the state or the county, city, or other political subdivision.*

(b) If the officer or employee is scheduled to work a shift that begins on one calendar day and ends on the next calendar day, the officer or employee shall be charged military leave for only the first calendar day. If the officer or employee is scheduled to work a shift that begins on one calendar day and ends later than the next calendar day, the officer or employee shall be charged

military leave for each calendar day except the calendar day on which the shift ends.³

Section 38.40.060(4)(a) is very clear—the employee should only be charged for a day of paid military leave (one of the 21 that the employee is entitled to for that fiscal year) for a day that the employee otherwise would have worked. The employee should not be charged for Saturdays, Sundays, or legal holidays unless the employee would have worked on those days if he or she had not been on military duty on those days.

Accordingly, public employees in the state of Washington accrue 21 days of paid military leave each year. But under a provision of the Washington State Patrol's internal policy, troopers on a four-day-a-week work schedule who take more than 15 consecutive days of military leave are involuntarily converted to a five-day-a-week schedule (and only for the time when they are on military leave). This scheduling change is intended to cause these troopers to use their accrued days of paid military leave at an accelerated rate. Immediately after the trooper's return from leave, the prior four-day-a-week schedule is restored. However, during that leave they were charged military leave for days that they would not regularly work, thus the trooper's military leave balance is artificially depleted.

Q: Is this case a class action? What does that mean?

A: Yes, this case is a class action. That means that a favorable outcome will benefit Barbara Werner *and all other state and local government employees in the State of Washington who are similarly situated.* Let us

³ Rev. Code Wash. § 38.40.060 (emphasis supplied).

praise Barbara Werner because she is the one employee who had the courage to serve as the named plaintiff.

Q: What is the relationship between state laws like section 38.40.060 and the federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: USERRA is a floor and not a ceiling on the employment rights of persons who are serving or have served our country in uniform, in the Active Component or the Reserve Component of the armed forces. The pertinent section of USERRA is as follows:

(a) Nothing in this chapter 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 in this chapter.

(b) 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 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 receipt of any such benefit.⁴

Washington and more than 40 other states provide, by state law, *paid military leave* for state and local government employees who serve part-time as RC service members. In our ROA Law Review Library,

⁴ 38 U.S.C. § 4302.

please see our “State Leave Laws” section. We have an article for each of the 50 states plus the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands about these laws. When state and local government employees have the right to *paid military leave*, it is usually by state law.

Q: Does USERRA give employees the right to paid military leave?

A: Under some circumstances, yes, under USERRA’s “furlough or leave of absence” clause. That provision reads as follows:

(b)

(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—

(A) *deemed to be on furlough or leave of absence while performing such service; and*

(B) *entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.*⁵

ROA has argued, in several amicus curiae briefs that we have filed, that section 4316(b)(1) means that if an employer grants paid military leave to employees who are away from work for non-military reasons (like jury duty), the employer must grant paid military leave for a

⁵ 38 U.S.C. § 4316(b)(1) (emphasis supplied).

comparable period of absence from work for military duty or training. Three circuits have agreed with our position.⁶

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.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve 32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).⁷

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

⁶ See *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424 (9th Cir. 2023); *Travers v. FedEx Corp.*, 8 F.4th 198 (3rd Cir. 2021); *White v. United Air Lines*, 987 F.3rd 616 (7th Cir. 2021). The other circuits have not yet addressed this specific legal question, but when they do, they will likely follow these three circuits. See generally Law Review 23026 (May 2023).

⁷ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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, Department of Labor (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 costs 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 eight⁸ 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, 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:

⁸ Congress recently established the United States Space Force as the eighth uniformed service.

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⁹ You can also contribute on-line at www.roa.org.