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I Am Being Processed for a Bad Discharge by the Army. It Is a Terrible Mistake and a Great Injustice. What Effect Will this Have on my Right to Reemployment in my Pre-Service Job?

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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>.

Q: I am a soldier on active duty in the Army. Two years ago, I left my civilian job at a big company (let us call it Acme Industries) to enlist in the Army. Like everyone joining the military, I signed up for an eight-year enlistment, running until June 2029. My enlistment contract called for me to serve on active duty for four years, until June 2025. Now, I am being processed for an early and unsatisfactory discharge. I think that I am being treated most unfairly.

In our unit, we have a random urinalysis each month. In June 2023, my name came up, and I submitted a urine sample, as required. To my complete surprise, my urine sample “popped positive” according to the urinalysis coordinator. I vehemently deny having consumed any controlled substance.

I believe that the urinalysis coordinator was very sloppy about how he complied with the regulations about the chain of custody for urine samples. *The urine sample that was determined to be positive was not my urine.* But I have been unable to convince the military authorities that a terrible mistake has been made and a terrible injustice is taking place.

I am being processed for a bad discharge. The discharge could be If labeled “general, under honorable conditions” or it could be labeled “under conditions other than honorable.” Either way, I will likely be off active duty and discharged from the Army by the end of September.

When I left my job at Acme Industries, I told my immediate supervisor that I was quitting because I had enlisted in the Army and was required to report to basic training. I did not say anything about returning to my pre-service civilian job at Acme after leaving active duty, and I was not aware at the time that federal law gave me that right.

Recently, while doing research on the Internet, I found your Law Review 23001 (January 2023) and learned that the Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to persons serving in the Active Component of the armed forces as well as to persons serving in the Reserve or National Guard.

If I apply for reemployment at Acme Industries after I am discharged by the Army, will I have the right to reemployment?

Answer, bottom line up front:

If you receive a general discharge, and if you meet the five conditions for reemployment under USERRA, you have the right to prompt reemployment at Acme Industries in the position of employment that you would have received if you had remained continuously employed (possibly a better job than the position you left), and you are entitled to Acme seniority and pension credit as if you had remained continuously employed at the company. If the Army gives you an “other than honorable” discharge, you are not entitled to reemployment.

Explanation

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

- a. You must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.³
- b. You must have given the employer prior oral or written notice.⁴
- c. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years.⁵
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁶
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.⁷

If you meet these five criteria, you are entitled to prompt reemployment at Acme, and you are entitled to be treated, for seniority and pension purposes, as if you had remained continuously employed in your pre-service Acme job during the entire time that you were away from work for service. If you fail to meet one or more of these criteria, you are not entitled to reemployment.

³ 38 U.S.C. § 4312(a).

⁴ 38 U.S.C. § 4312(a)(1).

⁵ 38 U.S.C. § 4312(c).

⁶ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offences) and OTH (“other than honorable”) administrative discharges.

⁷ After a period of service that lasted more than 180 days, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

Q: What kind of military discharge disqualifies me from the right to reemployment?

A: Section 4304 of USERRA provides:

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

- (1)** A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.
- (2)** A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.
- (3)** A dismissal of such person permitted under section 1161(a) of title 10.
- (4)** A dropping of such person from the rolls pursuant to section 1161(b) of title 10.⁸

Section 4331(a) of USERRA⁹ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The DOL USERRA regulations are published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002.¹⁰

⁸ 38 U.S.C. § 4304.

⁹ 38 U.S.C. § 4331(a).

¹⁰ 20 C.F.R. Part 1002.

Five sections of the DOL USERRA regulations pertain to section 4304. Those sections are as follows:

What type of discharge or separation from service is required for an employee to be entitled to reemployment under USERRA?

USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, he or she will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee not have received one of these types of discharge.¹¹

What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?

Reemployment rights are terminated if the employee is:

- (a)** Separated from uniformed service with a dishonorable or bad conduct discharge;
- (b)** Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;
- (c)** A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of

¹¹ 20 C.F.R. § 1002.134 (bold question in original).

a sentence of a general court-martial; or, in time of war, by order of the President; or,

(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.¹²

Who determines the characterization of service?

The branch of service in which the employee performs the tour of duty determines the characterization of service.¹³

If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?

Yes. A military review board has the authority to prospectively or retroactively upgrade a disqualifying discharge or release. A retroactive upgrade would restore reemployment rights providing the employee otherwise meets the Act's eligibility criteria.¹⁴

If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?

¹² 20 C.F.R. § 1002.135 (bold question in original).

¹³ 20 C.F.R. § 1002.136 (bold question in original).

¹⁴ 20 C.F.R. § 1002.136 (bold question and bold yes in original).

No. A retroactive upgrade allows the employee to obtain reinstatement with the former employer, provided the employee otherwise meets the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between discharge and the retroactive upgrade are not required to be restored by the employer in this situation.¹⁵

Q: An Army judge advocate suggested that I apply for reemployment at Acme even if the Army gives me an “other than honorable” (OTH) discharge. What is the point? If my OTH discharge means that I do not have the right to reemployment, why should I bother to apply for reemployment?

A: If you make a timely application for reemployment and otherwise meet the USERRA eligibility criteria, and if at some point the Army *retroactively* upgrades your discharge to honorable or at least to general, you will have the right to reemployment. If you fail to apply for reemployment within the deadline, even a retroactive upgrade of your discharge will not give you the right to reemployment.

Q: What is the difference between a retroactive upgrade and a prospective upgrade?

A: The great majority of discharge upgrades are prospective, not retroactive. For example, Joe Smith served on active duty for two years, from 1980 to 1982, when he received an OTH discharge because of conduct problems. After leaving the Army, Joe turned his life around and became a model citizen. If the Army concludes that it is likely that

¹⁵ 20 C.F.R. § 1002.138 (bold question in original).

the urine sample that “popped positive” was not your urine, the Army will upgrade your discharge *retroactively*.

Q: Like many employers, Acme Industries has a lot of unfilled job vacancies and has had difficulty finding qualified employees. If I apply for reemployment, Acme may offer me employment without acknowledging that I am entitled to reemployment. In that situation, am I entitled to insist that Acme treat me as if I had been continuously employed by the employer during the time that I was away for Army service?

A: No. The right to seniority credit for the service time applies to a “person who is reemployed under this chapter.”¹⁶ Similarly, the right to civilian pension credit for the military service time applies to a person who has been “reemployed under this chapter.”¹⁷ If you have an OTH discharge that has not been upgraded retroactively, you are not entitled to reemployment, and the company is not required to give you seniority or pension credit for the time that you were away from work for service.

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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

¹⁶38 U.S.C. § 4316(a).

¹⁷ 38 U.S.C. § 4318(a)(1)(A).

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).¹⁸

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, 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,

¹⁸ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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 eight¹⁹ 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:

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¹⁹ Congress recently established the United States Space Force as the eighth uniformed service.

²⁰ You can also contribute on-line at www.roa.org.