

LAW REVIEW¹ 23057

October 2023

What Is an Entry-Level Separation? Is a Recipient of An Entry-Level Separation Entitled to Reemployment in his or her Pre-Service Civilian Job?

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1.1.1.2—USERRA applies to small employers.

1.3.1.1—Left job for service and gave prior notice.

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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 retired Army Reserve colonel³ and a member of the Reserve Organization of America (ROA).⁴ I have read with great interest several 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. Your USERRA articles were very helpful to me when I was serving in the Army Reserve and balancing that with my full-time civilian job. I retired from the Army Reserve ten years ago, but I continued reading your articles because I am interested in how USERRA applies to service members in the next generation. Now, it appears that your articles are relevant to my son.

My son graduated from high school three years ago and was working as a stocker and cashier in a small local store when he got interested in military service earlier this year. He enlisted and reported to basic training. Just 90 days later, the Army discharged him with an uncharacterized “entry-level separation.”

First, what is an entry-level separation? I was surprised when my son chose to enlist and even more surprised when he returned home just three months after departing.

A: An official Department of Defense (DOD) website explains the entry-level discharge as follows:

³ The factual set-up for this article is hypothetical but realistic.

⁴ In 2018, members of the Reserve Officers Association amended the ROA Constitution, making enlisted service members, as well as officers, eligible for full membership in the organization, including voting and running for office. The organization adopted the “doing business as” name of Reserve Organization of America to emphasize that the organization represents and seeks to recruit as members those who are serving or have served our country in uniform, from E-1 to P-10.

Entry-level separations, or uncharacterized discharges, are given to individuals who separate prior to completing 180 days of military service, or when discharge action was initiated prior to 180 days of service. This type of discharge does not attempt to characterize service as good or bad.⁵

For more than 40 years, since 1982, it has been DOD policy not to characterize the quality of military service of service members who are discharged in the first 180 days of their service, for whatever reason. The fact that your son was sent home early with an entry-level separation does not necessarily mean that he did anything wrong. There could be an entirely innocent explanation. For example, there may be a medical disqualification that was missed during his physical at the Military Examination and Processing Station but which became apparent after he reported to basic training.

Q: My son informed me and his mother of his enlistment, and I urged him to notify his employer, the store owner, well in advance of the date that he would need to depart to travel to basic training, and my son followed my advice. He told the store owner that he would be on active duty for at least four years and probably for a full career of 20 years or more. He said nothing to the employer about returning to work at the store after completing his military service, and he was unaware that federal law might give him that right.

I did not discuss USERRA with my son before he reported to basic training. I did not know that USERRA applies to persons enlisting in

⁵ See <https://dd214.us/military-discharge-overview/>. I have attached a link to this informative fact sheet at the end of this article.

the Active Component of the armed forces until I read your Law Review 23001 (January 2023).

Does the fact that my son did not mention USERRA when he notified the employer of his departure for military service mean that he does not have the right to reemployment at the store?

A: No, it does not mean that. Your son was not required to tell his employer that he intended to return to work at the store after completing his military service. The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.⁶

⁶ 20 C.F.R. § 1002.88 (bold question in original).

Q: Why does USERRA provide the right to reemployment even to a person who firmly believes, at the time of departure from the civilian job, that he will not want reemployment after he completes his service?

A: USERRA's legislative history answers that question in one eloquent paragraph:

The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time a person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an "unburned bridge." Not until the individual's discharge or release from service and/or transportation back home, which triggers the application time, does the servicemember have to decide whether to recross that bridge. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946): "He [the returning veteran] is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life."⁷

When he left his home and his civilian job to report to basic training, your son's firm intention was to remain on active duty for a full career of 20 years or more, but the situation changed. An unforeseen

⁷ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1, page 26. This report can be found in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 809 of the 2021 edition of the *Manual*.

development made it impossible for him to remain on active duty for the long haul. USERRA's "unburned bridge" is very valuable for a person like your son. If your son meets the five USERRA conditions for reemployment, he will have the right to return to work at the store.⁸

Q: What kind of military discharges disqualify a person from the right to reemployment?

A: Section 4304 of USERRA provides:

A person's entitlement to the benefits of this chapter [USERRA] 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 [10 USCS § 1161(a)].
- (4)** A dropping of such person from the rolls pursuant to section 1161(b) of title 10 [10 USCS § 1161(b)].

The pertinent section of the DOL USERRA regulation is as follows:

⁸ Like any returning veteran or service member, your son must have left his civilian job to perform uniformed service and must have given the employer prior notice. He must have been released from active duty without having exceeded the five-year limit and without having received a disqualifying bad discharge from the military. After release from active duty, he must have made a timely application for reemployment with the pre-service employer. See generally Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

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 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.⁹

Section 4302 of USERRA makes it unlawful for an employer to impose an “additional prerequisite” upon the exercise of USERRA rights or the enjoyment of USERRA benefits.¹⁰

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

¹⁰ See 38 U.S.C. § 4302(b). See also *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008), cert. denied, 556 U.S. 1165 (2009); *Petty v. Metropolitan Government of Nashville-Davidson County*, 687 F.3d 710 (6th Cir. 2012); Law Review 12075 (August 2012).

An uncharacterized entry-level separation is not a disqualifying bad discharge. Your son has the right to reemployment if he meets the other four USERRA conditions.

Q: After he was released from active duty with an entry-level separation, how long did my son have to apply for reemployment at the store?

A: After a period of service of more than 30 days but less than 181 days, the returning service member or veteran has 14 days to apply for reemployment.¹¹

Q: After I spoke to you on the telephone, I contacted my son as quickly as possible and explained to him that he must immediately apply for reemployment. My son visited the store at 9 am on Day 15, after his release from active duty. Thus, he missed the 14-day deadline by a few hours. Does this tardiness in applying for reemployment mean that my son does not have the right to reemployment?

A: No. USERRA provides:

A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work¹².

¹¹ See 38 U.S.C. § 4312(e)(1)(C).

¹² See 38 U.S.C. § 4312(e)(1)(3).T

The pertinent section of the DOL USERRA regulation is as follows:

Are there any consequences if the employee fails to report for or submit a timely application for reemployment?

(a) If the employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and other rights and benefits. Rather, the employee becomes subject to the conduct rules, established policy, and general practices of the employer pertaining to an absence from scheduled work.

(b) If reporting or submitting an employment application to the employer is impossible or unreasonable through no fault of the employee, he or she may report to the employer as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employer by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the employee will be considered to have timely reported or applied for reemployment.¹³

Q: On the day after my son applied for reemployment, I contacted the store owner and told him that a federal law called "USERRA" applies to him and that he is required to reemploy my son. The store owner said: "My brother is a lawyer. He told me that the federal employment laws only apply to employers with 15 or more employees. For that reason, I have never had more than 14

¹³ 20 C.F.R. § 1002.117 (bold question in original)..

**employees in my store. USERRA does not apply to me and my store.”
What do you say about that?**

A: Your brother is right about other federal employment laws but wrong about the federal reemployment statute. The reemployment statute has never had an applicability threshold based on the size of the enterprise or the number of employees. You only need one employee to be an employer for the purposes of USERRA.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as the long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA’s legislative history provides: “This chapter [USERRA] would apply, as does current law, to all employers regardless of the size of the employer or the number of employees. *See Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).”¹⁴

In the *Cole* case, Dr. Swint owned a ranch and employed one ranch hand, Mr. Cole. Mr. Cole joined the National Guard and took time off from his job for his initial active duty training (boot camp). Dr. Swint filled the position with another ranch-hand and refused to reemploy Mr. Cole upon his return from military training.

Dr. Swint argued that since he had only one employee, he was a “casual employer” and not subject to the requirements of the reemployment statute. The 5th Circuit¹⁵ forcefully rejected that assertion. If Congress had intended to exempt small employers, it would have written such an

¹⁴ House Committee Report, April 28, 1993, H.R. Rep. 103-65, Part 1. This committee report is reprinted in Appendix BD-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted language can be found on page 803 of the 2021 edition of the *Manual*.

¹⁵ The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

exemption into the text of the statute, as it has with other employment statutes, the court held. The lack of an express exemption for small employers means that they are subject to the reemployment statute.

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).¹⁶

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

¹⁶ 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 legislators and 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 eight¹⁷ 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 <https://www.roa.org/opage/memberoptions/>.

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:

¹⁷ Congress recently established the United States Space Force as the eighth uniformed service.

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Here is a link to the definitive DOD fact sheet on military separations:

[https://dd214.us/military-discharge-overview.](https://dd214.us/military-discharge-overview)

¹⁸ You can also contribute on-line at www.roa.org.