

LAW REVIEW¹ 24006

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Congress, Please Close the Loophole in the USERRA Provision for Awarding Attorney Fees in USERRA Cases Involving The United States Court of Appeals for the Federal Circuit.

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

1.4—USERRA enforcement.

Erickson v. United States Postal Service, 571 F.3d 1364 (Fed. Cir. 2009)
Erickson I.

Erickson v. United States Postal Service, 636 F.3d 1353 (Fed. Cir. 2011)
Erickson II.

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>.

Erickson v. United States Postal Service, 759 F.3d 1341 (Fed. Cir. 2014), cert. denied, 574 U.S. 1150 (2015) Erickson III.

In Act III, Scene 1 of *Hamlet*, written by William Shakespeare in 1601, Prince Hamlet launched into a litany of all that is wrong with human life, while contemplating suicide. One item on the long list was “the law’s delays.” That situation has only gotten worse in the intervening 423 years. A good illustration of the delay that is endemic to legal proceedings is the case of Sergeant Major Richard Erickson.³

Under section 4324 of the Uniformed Services Employment and Reemployment Rights Act (USERRA),⁴ this federal law is enforced against federal executive agencies, as employers, by means of complaints filed in the Merit Systems Protection Board (MSPB) by federal employees, former federal employees, or unsuccessful applicants for federal civilian employment. Those USERRA claimants can be represented by the United States Office of Special Counsel,⁵ or they can be represented by attorneys that they retain.⁶

If the USERRA claimant is represented by retained private counsel, and if he or she prevails, the MSPB can award that prevailing claimant reasonable attorney fees:

If the Board [MSPB] determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such

³ Please see the citations to the three Court of Appeals decisions, above.

⁴ 38 U.S.C. § 4324.

⁵ 38 U.S.C. § 4324(a)(2)(A).

⁶ 38 U.S.C. § 4324(b).

person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.⁷

Sergeant Major Erickson retained private counsel and brought an action in the MSPB against his employer, the United States Postal Service (USPS). He lost in the MSPB and appealed to the United States Court of Appeals for the Federal Circuit, which reversed the MSPB decision and remanded the case to the MSPB. On remand, he lost again, and he appealed to the Federal Circuit again, and the Federal Circuit reversed the MSPB again.

When this case was finally resolved in Erickson's favor, he applied to the MSPB for attorney fees. The Board awarded him substantial attorney fees for his work before the Board itself but not for work done before the Federal Circuit Court of Appeals. Erickson appealed to the Federal Circuit yet again, *Erickson III*. The Federal Circuit held that neither the MSPB nor the Federal Circuit had the authority to award Erickson attorney fees for the work done before the appellate court, based on the current wording of section 4324.

How the enactment of H.R. 3943 would change these provisions

On 6/9/2023, Representative Scott Franklin⁸ of Florida introduced H.R. 3943. If enacted, this bill will be known as the “Servicemember Employment Protection Act of 2023.” On 7/26/2023, the House Veterans’ Affairs Committee approved the bill and referred it to the

⁷ 38 U.S.C. § 4324(b)(4).

⁸ Representative Franklin graduated from the United States Naval Academy in 1986 and spent the next 14 years on active duty as a naval aviator. After he left active duty in 2000, he served another 12 years in the Navy Reserve, retiring as a Commander. After the terrorist attacks of 9/11/2001, he was recalled to active duty and served in the United States Central Command,

House of Representatives as a whole. At the end of this article, I have placed a link to the text of H.R. 3943.

As of this writing, there is no companion bill in the United States Senate. Readers, please contact your two United States Senators and ask them to introduce a companion bill in the Senate, and please contact your United States Representative and ask him or her to vote for this bill when it comes to a vote in the House.

As reported by the House Veterans' Affairs Committee, H.R. 3943 would make five important changes to the Uniformed Services Employment and Reemployment Rights Act (USERRA):

- a. Eliminate the word “noncareer” from USERRA’s stated purpose.
- b. Improve the USERRA provision that makes it unlawful for an employer to retaliate against someone for exercising a USERRA right, asserting a USERRA claim, or participating in a USERRA investigation.
- c. Expand the injunctive relief that is available when an employer has violated USERRA or when a violation appears to be imminent.
- d. Improve the provision that provides for liquidated damages to be awarded against a private sector employer or a state or local government that has violated USERRA.
- e. Expand upon the mandatory attorney fees that can be awarded against federal executive agencies that have violated USERRA.

If enacted in its present form, section 2(e) of H.R. 3943 will amend section 4324 by adding the following new paragraph:

In such Federal Circuit proceeding, the court shall award such person reasonable attorney fees, expert witness fees, and other litigation expenses if such person—

- (A) Prevails in such Federal Circuit proceeding; and
- (B) Is not represented by the Special Counsel in such Federal Circuit proceeding.

This amendment will be very valuable in cases like *Erickson*. This amendment will effectively overrule *Erickson III*.

In cases involving federal executive agencies as USERRA violators, and also in cases involving USERRA violators that are state or local governments or private employers, veterans and Reserve Component service members need legal representation to obtain justice. These proposed amendments will improve the USERRA provisions that assist USERRA claimants in obtaining the legal representation that they need.

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).⁹

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 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.

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

If you are now serving or have ever served in any one of our nation's eight¹⁰ 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002¹¹

Here is a link to the complete text of H.R. 3943, the proposed “Servicemember Employment Protection Act of 2023”:

<https://www.govtrack.us/congress/bills/118/hr3943/text/rh>

¹⁰ Congress recently established the United States Space Force as the eighth uniformed service.

¹¹ You can also contribute on-line at www.roa.org.