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The Returning Service Member Is Entitled to Reinstatement in the Job She Would Have Attained if She Had Remained Continuously Employed, Not Necessarily the Job She Left. By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.2.5—USERRA applies to executive, managerial, and professional employees.

1.3.2.1—Prompt reinstatement upon release from service.

1.3.2.2—Continuous accumulation of seniority-escalator principle.

1.3.2.4—Status of the returning veteran.

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 (VRRRA—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 VRRRA 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 VRRRA 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 the Personnel Director of a very large company—let us call it Acme Industries. Our company has more than 100,000 employees and ten regional headquarters, including one in Chicago. We have an executive employee (let us call her Mary Smith or MS) who is a Colonel in the Army Reserve. Mary has been away from her job many times for short and long periods of military training and service. We have accommodated all of her periods of absence for military service, although the General Counsel of Acme Industries, I.R. Shyster, has told me that federal employment laws, including the Uniformed Services Employment and Reemployment Rights Act (USERRA), do not apply to executive employees like MS.

MS has worked her way up the executive ladder at our Chicago regional headquarters and was promoted to Regional Director in 2017. MS was recently away from her Acme Industries job for exactly one year, from 10/1/2022 until 9/30/2023. The questions are: Was MS entitled to reemployment when she returned to our company in October 2023? And are we required to reinstate her as the Regional Director?

On 8/1/2022, MS gave us two months of advance notice of her need to be away from her Acme job for military service starting on 10/1/2022. Because of MS' expected absence for one year, we promoted Bob Adams (BA) to the Regional Director position, and for the last six weeks before she left her Acme job in late September 2022 MS was the Assistant Regional Director. She was very helpful in bringing BA up to speed on all the pending issues for the Chicago regional office.

When MS left her job at Acme on 9/30/2022, she was the Assistant Regional Director in the Chicago regional headquarters. When MS applied for reemployment on 10/15/2023, we reinstated her as the Assistant Regional Director. But MS claims that, under USERRA, she is entitled to be reinstated as the Regional Director. I found several of your “Law Review” articles about USERRA on the Internet. What do you think?

Answer, bottom line up front:

In the first place, USERRA most definitely applies to all employees of a company, including executive, managerial, and professional employees. Other federal employment laws do not apply to employees at the top of the pyramid, but USERRA does. Mr. Shyster is wrong in his assertion that USERRA does not apply to MS because she is a company executive.³

If MS meets the five USERRA conditions, she is entitled to reinstatement as the Regional Director in Chicago or in another position, for which she is qualified, that is of like seniority, *status*, and pay. The Assistant Director position is not of the same status as the Director position, even if the pay is the same.

Q: What are USERRA’s conditions for the right to reemployment?

A: As I have explained in Law Review 15116 (December 2015) and many other articles, MS (or any returning service member or veteran)

³ The pertinent section of the Department of Labor (DOL) USERRA Regulation provides: “USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.” 20 C.F.R. § 1002.43.

must meet five conditions to have the right to reemployment under USERRA:

- a. She must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.⁴
- b. She must have given the employer prior oral or written notice.⁵
- c. Her cumulative period or periods of uniformed service, related to the employer relationship for which she seeks reemployment, must not have exceeded five years.⁶
- d. She must have been released from the period of service without having received a disqualifying bad discharge from the military.⁷
- e. After release from the period of service, she must have made a timely application for reemployment with the pre-service employer.⁸

It is clear and beyond dispute that MS met these conditions when she applied for reemployment on 10/15/2023.

Q: If MS met these conditions in October 2023, what kind of position was she entitled to?

⁴ 38 U.S.C. § 4312(a). There is no doubt that MS left her Acme job in 2022 to perform uniformed service.

⁵ 38 U.S.C. § 4312(a)(1). You have acknowledged that MS gave the company two months of advance notice.

⁶ 38 U.S.C. § 4312(c). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit. MS’ 2022-23 active duty was voluntary and not exempt from the computation of her five-year limit, but her other military periods, during her Acme employment, have all been exempt from the five-year limit.

⁷ 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. MS was not discharged by the Army on 9/30/2023. She was simply released from active duty to return to her part-time Army Reserve capacity.

⁸ After a period of service that lasted more than 180 days, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). MS applied for reemployment just 15 days after the Army released her from active duty.

A: Because MS met these conditions, she was entitled to be reemployed “in the position of employment in which the person [MS] *would have been employed* if the continuous employment of such person had not been interrupted by such service, or a position of like seniority, *status*, and pay, the duties of which the person is qualified to perform.”⁹ If MS’ employment with Acme had not been interrupted by this 2022-23 period of uniformed service, she would still be the Regional Director in Chicago. Thus, MS is entitled to be reemployed as the Regional Director, not the Assistant Regional Director. The Assistant Director position is not of like status, and reinstating MS into the Assistant Director position is not sufficient under USERRA, even if the salary is the same.

The fact that reemploying MS in the appropriate position of employment would necessitate laying off another employee does not excuse the employer’s failure to reemploy MS as required.

MS is entitled to reemployment in the position that she would have attained, or another position of like seniority, *status*, and pay, *even if that means that another employee must be displaced to make room for her*. The pertinent section in the Department of Labor (DOL) USERRA regulation is as follows:

Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force

⁹ 38 U.S.C. § 4313(a)(2)(A) (emphasis supplied).

*that would have included that employee. The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee.*¹⁰

If filling the vacancy defeated the right to reemployment of the returning veteran, USERRA would be of little value. Many old and recent cases show that the veteran's right to prompt reemployment upon returning from service is not contingent on the existence of a vacancy at that time. The United States Court of Appeals for the First Circuit¹¹ has held:

Finally, we note that USERRA affords broad remedies to a returning servicemember who is entitled to reemployment. For example, 20 C.F.R. 1002.139 unequivocally states that "the employer may not refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee."¹²

The United States Court of Appeals for the Federal Circuit¹³ has held:

The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols' [Nichols was the returning veteran and plaintiff] former

¹⁰ 20 C.F.R. 1002.139(a) (emphasis supplied).

¹¹ The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

¹² *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1st Cir. 2013).

¹³ The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

position was “unavailable” because it was occupied by another and thus it was within the department’s discretion to place Nichols in an equivalent position. This is incorrect. Nichols’ former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ... Although occupied by Walsh, Nichols’ former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.¹⁴

Also relevant is *Ryan v. Rush-Presbyterian-St. Luke’s Medical Center*.¹⁵ Ryan was the nurse-manager of a medical facility when she was called to active duty for Operation Desert Storm. She met the eligibility criteria under the Veterans’ Reemployment Rights Act (VRRRA), the precursor of USERRA. She was reinstated as the Assistant Nurse Manager, with the same salary. The District Court granted the employer’s motion for summary judgment, apparently on the “no harm, no foul” theory. The United States Court of Appeals for the 7th Circuit¹⁶ reversed because the Assistant Nurse Manager position is not of the same status as the nurse manager position.

¹⁴ *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer’s failure to reemploy the returning veteran in the appropriate position, I invite the reader’s attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln-St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group*, 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC*, 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.*, 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.*, 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981); *Jennings v. Illinois Office of Education*, 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Muscianese v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

¹⁵ 15 F.3d 697 (7th Cir. 1994).

¹⁶ The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

Q: We recently have a vacancy for our Regional Director position in San Francisco, and I offered that position to MS. She declined to take the position, saying that her husband is a partner in a Chicago law firm and cannot move to San Francisco and her twin children are in 11th grade and want to remain in the same school to graduate next year. We have offered MS a position that is identical to her former position in Chicago. Does that not moot this controversy?

A: No, because location (commuting area) is an aspect of the *status* to which the returning veteran is entitled. Offering the returning veteran a similar job in a different city is insufficient.¹⁷

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This article is one of 2,100-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).¹⁸

¹⁷ See *Armstrong v. Cleaner Services, Inc.*, 79 LRRM 2921, 2923 (M.D. Tenn. 1972).

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

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, federal 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 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,

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

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/page/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 20002²⁰

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