

LAW REVIEW¹ 24016

March 2024

USERRA Gives a Reservist the Right to an Unpaid but Job-Protected Leave of Absence for a Dental Examination Required Because of Imminent Mobilization Orders.

By Thomas Jarrard, USMCR (Ret.)²

1.3.1.1—Left job for service and gave prior notice to the employer.

Q: I am a Major in the United States Marine Corps Reserve (USMCR) and a judge advocate. On the civilian side, I recently made partner at a major nationwide law firm. I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I recently joined your organization, the Reserve Organization of America (ROA),³

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2200 “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 Spouse 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 (Wright) am the author of more than two thousand of the articles.

² Mr. Jarrard is a life member of the Reserve Organization of America (ROA). His practice, www.servicememberlaw.com, is focused on Veterans and Uniformed Services Employment and Reemployment Rights Act (USERRA) litigation. He is admitted to practice in Washington State; the Federal Courts of Washington, Colorado, Wisconsin; the 5th, 7th, 8th, 9th, 10th, 11th, and the Federal Circuit Court of Appeals; the Merit System Protection Board; and the United States Supreme Court. He received his JD from Gonzaga University School of Law in 2007 and an MBA from the Columbia College School of Business in 2000. During law school he served as an associate editor for the Gonzaga Journal of International Law and as a Thomas More Scholar. Thomas retired with 25 years of service in the United States Marine Corps and Reserve with two combat tours to Iraq. He is an accredited Attorney by the U.S. Department of Veterans Affairs and his law firm is certified by the Washington State DAV as a Veteran Owned Business. Thomas can be contacted by email at: tjarrard@att.net.

³ The Reserve Officers Association was established in 1922 by veterans of “The Great War” as World War I was then known. Captain Harry S. Truman was one of the founders. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to promote the development and implementation of policies that provide for adequate national defense. In 2018, ROA members amended the ROA Constitution to make enlisted service members, as well as officers, eligible for membership. 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, service members of all ranks.

because I want to support the organization that provides this essential service.

My good friend (let us call him Lieutenant Colonel Chesty Puller) is the Commanding Officer (CO) of a USMCR unit that is being mobilized and will be deployed overseas in a few weeks. One unit member (let us call him Lance Corporal John Basilone) needs a dental examination urgently, to make him eligible for mobilization. Basilone lives in a small town that has only one dentist. Basilone called the dental office to make an appointment, but the first available appointment is three months away, and by that time the unit will be deployed.

Basilone explained the urgency of the need for the dental examination, and the clerk at the dental office promised to call Basilone the first time that a patient cancels an appointment or fails to show up. The clerk will give Basilone the opportunity to come in at that time, but there may be very little notice, and it may be impossible for Basilone to give advance notice to his civilian employer, Vidkun Quisling, the owner-operator of Quisling's Norwegian Seafood Restaurant.

Basilone gave Mr. Quisling four months of advance notice of the mobilization, and Mr. Quisling reacted negatively to Basilone "going off to play soldier when we need you here at the restaurant." More recently, Basilone gave Quisling notice that he will need some time off for the dental appointment and that it may be impossible for him to give advance notice of the day and time of the appointment because of the circumstances. Quisling responded: "If you miss one minute of work without my permission, I will fire you."

Colonel Puller asked my advice as to how he should proceed with this problem. After reading several of your “Law Review” articles, I am sending you this e-mail. How should I advise Colonel Puller?

Answer, bottom line up front:

First, it should be noted that Basilone does not need Quisling's permission to absent himself from work to perform "service in the uniformed services" as defined by USERRA. The pertinent section in the Department of Labor (DOL) USERRA Regulation is as follows:

Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.⁴

If Basilone meets the five USERRA conditions for reemployment and Quisling fails to reemploy him, or if Quisling fires or otherwise disciplines Basilone for exercising his USERRA rights, Quisling will be violating USERRA.

Q: What are the five conditions for reemployment?

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

⁴ 20 C.F.R. § 1002.87 (bold question in original).

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services as defined by USERRA.⁵
- b. You must have given the employer prior oral or written notice.⁶
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.⁷
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁸
- e. After release from the period of service, you must have made a timely application for reemployment.⁹

You must meet all five of these conditions to have the right to reemployment. If you fail to meet one of the conditions, you do not have the right to reemployment even if you meet the other four conditions.

Q: If Basilone misses an hour or two of work at the restaurant to get a dental examination from a civilian dentist, does that amount to “service in the uniformed services” as defined by USERRA?

A: Yes, under the unusual circumstances of this case.

⁵ 38 U.S.C. § 4312(a).

⁶ 38 U.S.C. § 4312(a)*1).

⁷ 38 U.S.C. § 4312(c).

⁸ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious crimes, and other-than-honorable administrative discharges.

⁹ After a period of service of 181 days or more, you must apply for reemployment within 90 days. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

Section 4303 of USERRA¹⁰ defines 17 terms used in this law. The term “service in the uniformed services” is defined as follows:

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service *under competent authority* and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act, State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), *a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty*, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, a period for which a person is absent from a position of employment due to an appointment into service in the Federal Emergency Management Agency as intermittent personnel under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by

¹⁰ 38 U.S.C. § 4303.

section 12503 of title 10 or section 115 of title 32.¹¹

Under the unusual circumstances of this case, it is clear that the dental examination is “for the purpose of an examination to determine the fitness of the person to perform any such duty” (uniformed service). The service (the dental appointment) must be “under competent authority.” To demonstrate that element, Colonel Puller should give Lance Corporal Basilone a written order directing him to get a dental examination as soon as possible and to get the dentist to complete the examination form and to deliver the completed form back to Colonel Puller.

Q: Lance Corporal Basilone probably will not know the timing of his dental appointment until a few hours in advance, when the clerk at the dental office calls him to inform him that another patient has canceled and that there is an opening for him. Under these circumstances, how is Basilone supposed to give prior notice to his civilian employer?

A: First, it should be noted that there is an exception to the prior notice requirement: “No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable.”¹²

Second, it should be noted that the notice to the employer can be given by the person who is to perform the uniformed service (Basilone) or by “an appropriate officer of the uniformed service in which such service is

¹¹ 38 U.S.C. § 4303(13) (emphasis supplied).

¹² 38 U.S.C. § 4312(b).

performed.”¹³ As Basilone’s commanding officer, Puller is “an appropriate officer” of the United States Marine Corps, and it is appropriate for Puller to give the notice to Mr. Quisling, the employer. At the end of this article, I have posted a sample notification letter.

We cannot guarantee that Mr. Quisling will cooperate willingly and comply with USERRA, but it is important to help Lance Corporal Basilone dot the eyes and cross the tees to protect his rights.

Please join or support ROA

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).¹⁴

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

¹³ 38 U.S.C. § 4312(a)(1). See also 38 U.S.C. § 4303(8).

¹⁴ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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.

If you are now serving or have ever served in any one of our nation’s eight¹⁵ 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

¹⁵ Congress recently established the United States Space Force as the eighth uniformed service.

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 20002¹⁶

Here is a letter that Colonel Puller, the commanding officer, can send to Mr. Quisling, the civilian employer:

Mr. Vidkun Quisling
Quisling's Norwegian Seafood Restaurant
213 Main St.
Narvik, NY 12333

Dear Mr. Quisling:

Lance Corporal John Basilone is a member of the Marine Corps Reserve unit that I command. Our unit is being mobilized for an overseas deployment, and all unit members (including Basilone) are required to report to active duty on 1 April 2024. This letter will serve as my notice to you that Basilone is being mobilized and will be away from his job at your restaurant for a period of several months.

¹⁶ You can also contribute on-line at www.roa.org.

Under the law and military regulations, service members who are being mobilized need to have dental examinations and must be certified as dentally ready for mobilization. Reservists not on active duty are not entitled to military dental care, so the reservists must arrange for appointments with civilian dentists, and those civilian dentists must complete the necessary form and certify that the reservist is ready and that it is unlikely that the individual will need to be evacuated from the overseas location because of the dental emergency.

There is only one dentist in Basilone's hometown, and no regular appointments are available until after our unit mobilizes. The dental office has promised to notify Basilone when a regular patient cancels an appointment or fails to show up for an appointment, and then the dental office will squeeze in Basilone for the essential dental examination.

There may be very little or no advance notice, and it will be necessary to for Basilone to leave his civilian job or to fail to show up as scheduled in order for him to travel to the dental office for the examination. Under these circumstances, giving you advance notice of the time that Basilone will be away from work is impossible and precluded by military necessity.

We regret that the mobilization and the necessary dental examination will inconvenience you in the operation of your restaurant, but please understand that this inconvenience is necessitated by the need to defend our country. Your understanding and cooperation are appreciated.

If you have questions, please call the Department of Defense organization called “Employer Support of the Guard and Reserve” at 800-336-4590.

Sincerely,

Chesty L. Puller
Lieutenant Colonel, USMCR
Commanding Officer