

LAW REVIEW¹ 24034

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Mary Jones Left her Civilian Job as a National Guard Technician To Go On Active Duty for 3 Years. She Will Leave Active Duty Soon and Will Meet the 5 USERRA Conditions for Reemployment, But she Will Retire Soon from the National Guard. Mary Can Exercise her USERRA Rights And Return to Federal Civilian Employment in another Position.

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1.1.1.8—USERRA applies to the Federal Government.

1.1.3.3—USERRA applies to National Guard service.

1.4—USERRA enforcement.

1.8—Relationship between USERRA and other laws/policies.

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 an Army National Guard (ARNG) Colonel³ and a life member of the Reserve Organization of America (ROA).⁴ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have utilized your articles in understanding and exercising my legal rights. I have also shared your articles with my colleagues and subordinates in the ARNG.

I am approaching the end of my ARNG career. In September 1994, I graduated from Officer Candidate School (OCS) and was commissioned a Second Lieutenant. I then spent the next ten years (1994-2004) on full-time active duty. After I left active duty in 2004, I affiliated with the ARNG in my home State. I was a traditional National Guard soldier, and I was recalled to active duty in 2007-08 for service in Iraq. I served in combat but came home unscathed. I returned to my civilian job at Acme Industries and I also returned to being a traditional Army National Guard part-time soldier.

In 2014, I left my job at Acme Industries to become a National Guard technician. In October 2021, I was selected for a full-time position at the National Guard Bureau (NGB). I am on three-year Active Guard and Reserve (AGR) orders, from October 2021 through September 2024. In September, I will reach my Mandatory Removal Date (MRD), with 30 years of commissioned service. At that point, I will retire from the ARNG and leave active duty and return to my home State.

Recently, I traveled home on leave and visited the Adjutant General (TAG) of my State and also the personnel director for the TAG’s office. I told them that I will meet the five USERRA conditions for

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

⁴ The Reserve Officers Association was established in 1922 and chartered by Congress in 1950. In 2018, ROA members amended the ROA Constitution and made enlisted service members and veterans, as well as officers, eligible for full membership. ROA adopted the “doing business as” name of “Reserve Organization of America” to emphasize that we represent and seek to recruit as members service members and veterans of all ranks, from E-1 to O-10.

reemployment in October 2024 and that I want to return to federal civilian employment so that I can get Thrift Savings Plan (TSP) credit for this last three years of active duty and continue working as a federal civilian employee for several more years. I also told them that I am only 55 years old and that I am not ready to “hang it up” and play golf every day.

The TAG told me, and the personnel director concurred, that it is “impossible” for them to reemploy me as a National Guard technician because technicians must be active members of the National Guard, not retirees. I thought that I read somewhere that in this situation I can be reemployed by another federal government agency and continue my federal civilian career. Is that true? How does that work?

A: Yes, that is true because USERRA provides:

If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).⁵

Here is what needs to happen. First, you need to meet the five USERRA conditions and document that you meet them.⁶ Of course, the TAG will say that it is “impossible” to reemploy you as a technician because you

⁵ 38 U.S.C. § 4314(d).

⁶ You left your civilian job as a technician to go on this current active duty period and you gave prior oral or written notice to the TAG in September 2021. This three-year active duty period probably counts toward your five-year limit, but you have not exceeded and will not exceed your five-year limit with respect to your technician position. You have served honorably, and you will not receive a disqualifying bad discharge from the Army. After you leave active duty, you must apply for reemployment with the TAG within 90 days. See 38 U.S.C. § 4312(e)(1)(D). See *generally* Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions for reemployment.

have retired from the National Guard. You need to get the TAG to make that determination in writing and provide you a copy of the determination. Then, you need to take that determination to the United States Office of Personnel Management (OPM). OPM will then have the responsibility to identify for you a suitable alternative position *and to ensure that you are offered that position.*

Q: What happens if OPM fails or refuses to act as required by section 4314(d)?

A: In that case, you can sue OPM in the United States Merit Systems Protection Board (MSPB).⁷

Q: I called the Staff Judge Advocate (SJA) in the TAG's office—let us call him Colonel I.R. Shyster. I told him about section 4314(d) of USERRA. He said: "I have never heard of this. I think that you are making this up." What gives?

A: I am not making this up. I copied section 4314(d) directly from the United States Code, using my LEXIS account.⁸

USERRA was enacted almost 30 years ago, on 10/13/1994. There has certainly been adequate time to educate the TAGs and their SJAs about the details of USERRA, but it appears that more education is necessary.

I invite your attention to our Law Review 16009 (February 2016). In that article, I quoted and discussed section 4314(d) in the context of a real situation involving a National Guard technician who was called to active duty, deployed to Iraq, wounded in action, and medically retired from the Army as a result of his wounds. The TAG of his State and OPM should have helped him to get reemployment in an alternative federal

⁷ See generally Law Review 23024 (May 2023) for a detailed discussion of USERRA's enforcement mechanism with respect to federal executive agencies, including OPM.

⁸ LEXIS is a computerized legal research service.

civilian position for which he was qualified despite his service-connected disability, but this did not happen.

In Law Review 16009, I urged the Chief of the National Guard Bureau to educate the 54 TAGs and the SJAs about section 4314(d) of USERRA. It appears that this has not happened.

Q: Are there other circumstances where OPM is responsible for finding an alternative position for the returning veteran who meets the five USERRA conditions?

A: Yes. Alice Adams was employed by a federal agency. During the time that she was away from her job, the federal agency was abolished.⁹ In this situation, OPM is responsible for finding an alternative position for Alice and ensuring that she is offered the position.¹⁰

Bob Barnes was employed by an employer in the Legislative Branch or Judicial Branch of the Federal Government when he left his job for active military service. Bob meets the five USERRA conditions for reemployment, but the Legislative Branch or Judicial Branch employer finds it “impossible or unreasonable” to reemploy Bob. In this situation, OPM is responsible for identifying an alternative position for Bob and ensuring that he is offered the position.¹¹

Connie Cox was employed by a federal intelligence agency, like the Central Intelligence Agency or the Federal Bureau of Investigation, when she left her job for active military service. Connie meets the five USERRA conditions for reemployment, but the intelligence agency employer finds it “impossible or unreasonable” to reemploy Connie. In

⁹ This is an exceedingly rare occurrence, but there have been examples of federal agencies going out of business. For example, the Civil Aeronautics Board was established in 1938 and abolished in 1985. See https://en.wikipedia.org/wiki/Civil_Aeronautics_Board.

¹⁰ See 38 U.S.C. § 4314(b). This subsection also applies if the pre-service federal agency has not been abolished but it has been massively downsized and OPM finds that it is “impossible or unreasonable” for the agency to reemploy the veteran.

¹¹ See 38 U.S.C. § 4314(c).

this situation, OPM is responsible for identifying an alternative position for Connie and ensuring that she is offered the position.¹²

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).¹³

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.

¹² See 38 U.S.C. § 4315.

¹³ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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 eight¹⁴ 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/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
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¹⁴ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁵ You can also contribute on-line at www.roa.org.