

## **LAW REVIEW<sup>1</sup> 24036**

**July 2024**

### **DOJ Sues Oklahoma City Public Schools for Violating USERRA.**

**By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>**

**1.1.1.7—USERRA applies to state and local governments.**

**1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employment.**

**1.4—USERRA enforcement.**

**1.8—Relationship between USERRA and other laws/policies.**

On 5/29/2024, the United States Department of Justice (DOJ) sued the Oklahoma City Public Schools (OCPS) on behalf of Senior Airman (E-4) Michael J. McCullough, USAFR. At the end of this article, I have posted a

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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>.

copy of the DOJ complaint and also a copy of a *Military Times* article about this case. DOJ contends that OCPS, the public school system for most of the Oklahoma City metropolitan area, violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it refused to reinstate McCullough to his teaching job when he returned from a period of military service (February through December 2022) and met the USERRA conditions for reemployment. I commend DOJ and the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) for their excellent work in this case, and I endorse their legal theory.

## **USERRA**

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal statute that was enacted in 1994 as an update of and replacement for the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940. USERRA gives a person the right to reemployment after a period of voluntary or involuntary service in the uniformed services, and USERRA also protects individuals from employment discrimination in hiring, retention, promotions, and benefits of employment on the basis of their membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service. USERRA applies to almost all employers in the United States, including the Federal Government, the States, the political subdivisions of States (like OCPS), and private employers, regardless of size.

A person who leaves a civilian position of employment for uniformed service is entitled to reemployment upon release from the period of service if he or she meets five simple conditions. As I have explained in Law Review 15116 (December 2015) and many other articles, the

returning service member or veteran must meet five conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA.<sup>3</sup>
- b. Must have given the employer prior oral or written notice.<sup>4</sup>
- c. His or her cumulative period or periods of uniformed service, related to the employer relationship for which he or he seeks reemployment, must not have exceeded five years.<sup>5</sup>
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>6</sup>
- e. After release from the period of service, must have made a timely application for reemployment with the pre-service employer.<sup>7</sup>

It is clear beyond doubt that McCullough met these five conditions and OCPS had the legal obligation to reemploy him promptly in the position of employment that he would have attained if he had remained continuously employed by OCPS (possibly a better job than the one he left) and to treat him, for seniority and pension purposes, as if he had remained continuously employed in his civilian job during the entire time that he was away from work for service in the uniformed services.

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<sup>3</sup> 38 U.S.C. § 4312(a).

<sup>4</sup> 38 U.S.C. § 4312(a)(1).

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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). Shorter deadlines apply after shorter periods of service.

## Facts

Michael J. McCullough was hired by OCPS and began his job on 1/3/2022, teaching music at Fillmore Elementary School.<sup>8</sup> Just 39 days later, on 2/11/2022, McCullough unexpectedly received written Air Force orders directing him to report to active duty just three days later, on 2/14/2022. He immediately gave notice to the principal of Fillmore Elementary, and he reported to active duty as ordered.

On 3/10/2022, OCPS Human Relations (HR) sent McCullough a letter, telling him that his contract would not be renewed after the end of the 2021-22 school year. McCullough expected that his Air Force orders would end in July 2022, and he responded to the HR letter in April 2022, informing the school district of his intent to return to work at the start of the 2022-23 school year and asking the district to identify the school where he would be working. OCPS did not respond to his e-mail.

In July, the Air Force notified McCullough that his orders had been extended until 12/30/2022. McCullough notified OCPS of the extension and expressed the intent to return to work immediately after the Christmas break. McCullough sought reemployment immediately after he left active duty, but the school district refused to reemploy him.

### **McCullough complained to DOL-VETS that OCPS had violated his USERRA rights.**

On 12/13/2022, McCullough filed a formal complaint, in writing, with DOL-VETS, in accordance with section 4322 of USERRA.<sup>9</sup> In accordance with section 4322(d),<sup>10</sup> DOL-VETS investigated McCullough's complaint and found that it had merit. On 6/12/2023, DOL-VETS advised the

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<sup>8</sup> McCullough was originally hired by OCPS in August 2020 and worked as a band teacher at Capitol Hill Middle School. His employment was interrupted by required military training after he enlisted in the USAFR in June 2020, and the school district unlawfully refused to offer him employment for the 2021-22 school year. He was rehired on 1/3/2022 as a new hire with no seniority.

<sup>9</sup> 38 U.S.C. § 4322.

<sup>10</sup> 38 U.S.C. § 4322(d).

school district that it had violated USERRA when it refused to reinstate McCullough to his teaching job. DOL-VETS then tried to persuade OCPS to come into compliance with the federal law, but the school district refused to do so.

In accordance with section 4323(a)(1),<sup>11</sup> McCullough asked DOL-VETS to refer the case file to DOJ, and DOL-VETS complied with that request. In accordance with section 4323(a)(1)<sup>12</sup> DOJ reviewed the case file and determined that it was reasonably satisfied that McCullough was entitled to the USERRA benefits that he sought and filed suit against OCPS on 5/29/2024.

DOJ filed the lawsuit in the United States District Court for the Western District of Oklahoma. The Civil Action Number is CIV-24-544-R. You can find a link to the complaint at the end of this article.

### **Who is the named plaintiff in this lawsuit?**

The named plaintiff is Michael J. McCullough, the service member who is claiming that his USERRA rights were violated. When DOJ files USERRA lawsuits on behalf of individual service members or veterans, the named plaintiff is the individual, not the United States, unless the defendant-employer is a State.

“In the case of such an action [brought by DOJ] against a State (as an employer), the action shall be brought in the name of the United States, as the plaintiff in the action.”<sup>13</sup>“In this section [for purposes of USERRA enforcement], the term ‘private employer’ includes a political subdivision of a State.”<sup>14</sup> OCPS is a political subdivision of the State of

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<sup>11</sup> 38 U.S.C. § 4323(a)(1).

<sup>12</sup> Id.

<sup>13</sup> 38 U.S.C. § 4323(a)(1) (final sentence).”

<sup>14</sup> 38 U.S.C. § 4323(i).

Oklahoma. In drafting this complaint, DOL lawyers were correct to name McCullough, not the United States, as the plaintiff.

**Q: If DOJ is successful in this lawsuit, what remedies can the court award:**

**(d) Remedies.**

**(1)** In any action under this section, the court may award relief as follows:

**(A)** The court may require the employer to comply with the provisions of this chapter.

**(B)** The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

**(C)** *The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.*

**(2)**

**(A)** Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

**(B)** In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a

period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

**(3)** A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

**(e) Equity powers.** The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.<sup>15</sup>

If DOJ prevails, the court will order OCPS to comply with USERRA belatedly by putting McCullough in an appropriate position of employment and by treating him, for seniority and pension purposes, as if he had been continuously employed by the school district during the time that he was away from work for uniformed service and the time when the school district unlawfully delayed his reemployment. The court will order OCPS to compensate McCullough for the pay and benefits that he lost because of the delayed reemployment. If the court finds that the school district violated USERRA willfully, the court will double the back-pay award.<sup>16</sup>

**Q: McCullough was a new probationary teacher and had only been employed by OCPS for 39 days when he left his job to serve in the Air Force. The school district has the right to fire a probationary teacher for any reason or no reason. Where does DOJ get off on suing OCPS for firing or refusing to reinstate a probationary teacher?**

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<sup>15</sup> 38 U.S.C. § 4323(d) and (e) (emphasis supplied).

<sup>16</sup> 38 U.S.C. § 4323(d)(1)(C) (italicized above).

**A:** The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

**Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**

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USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.<sup>17</sup>

Neither McCullough's probationary status nor the short time that he was on the payroll before he was called to the nation's colors diminishes his USERRA rights.

**Q: What if there was no teacher vacancy in the middle of the school year (January 2023)?**

**A:** Because McCullough met the five USERRA conditions, he was entitled to prompt reinstatement in an appropriate position *even if that meant that the school district would have to displace another teacher.*

The pertinent section in the 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

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<sup>17</sup> 20 C.F.R. § 1002.41 (bold question in original).



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 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.*<sup>18</sup>

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 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 Circuit<sup>19</sup> 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.”<sup>20</sup>

The United States Court of Appeals for the Federal Circuit<sup>21</sup> has held:

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<sup>18</sup> 20 C.F.R. 1002.139(a) (emphasis supplied).

<sup>19</sup> The 1<sup>st</sup> 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.

<sup>20</sup> *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49, 55-56 (1<sup>st</sup> Cir. 2013).

<sup>21</sup> 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.

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 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.<sup>22</sup>

**Q: The school district board of trustees has a firm policy to value continuity in the teacher-student relationship and to avoid whenever possible changing the assigned teacher for a class during a school year. OCPS argues strenuously that it was not required to reinstate McCullough in January 2023, in the middle of the 2022-23 school year, because that would mean that the students in a class would have to part ways with their beloved teacher during the school year. What do you say about that?**

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<sup>22</sup> *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, I invite the reader's attention to *Cole v. Swint*, 961 F.2d 58 (5<sup>th</sup> Cir. 1992); *Goggin v. Lincoln-St. Louis*, 702 F.2d 698, 704 (8<sup>th</sup> 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. 1011 (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 (5<sup>th</sup> 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 (7<sup>th</sup> Cir. 1979); and *Muscianese v. U.S. Steel Corp.*, 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

**A:** The right of the returning veteran who meets the reemployment criteria to prompt reinstatement, during a school year, has been upheld.<sup>23</sup>

Maintaining continuity for the students is important, *but nothing is more important than defending our nation. If our nation is to defend itself, the military services must be able to recruit and retain a sufficient quantity and quality of military personnel, without reinstating the draft, and that means that the reemployment rights of those who are called to serve, voluntarily or involuntarily, must be respected and enforced.*

**Q:** I spoke to a parent of an OCPS student.<sup>24</sup> He said that he fundamentally disagrees with USERRA and with this lawsuit because he sees it as taking away from the fundamental value of local control of public schools. What do you say about that?

**A:** It has now been two generations since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973. Those who are considering enlistment today have never faced the prospect of being drafted, and neither have their parents. No one has been drafted by our country since the grandparents or great-grandparents of today's service members were of military age.

Relying exclusively on volunteers, our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that it is never necessary for our country to reinstate the draft.<sup>25</sup>

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<sup>23</sup> See *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 1011 (E.D. Mich. 1985); *Davis v. Halifax County School System*, 508 F. Supp. 966 (E.D.N.C. 1981).

<sup>24</sup> This sentence is hypothetical. I have not spoken to any OCPS parents.

<sup>25</sup> Those who advocate for the reinstatement of the draft in our country should consider the woeful performance of Russian conscripts in Ukraine.

Defending our country in a dangerous world, without relying on compulsion to fill the ranks, means that our nation must maximize the incentives and minimize the disincentives to military service in the Active Component, the Reserve, and the National Guard.

Most of the 2,200 articles in our “Law Review” series<sup>26</sup> address laws that seek to minimize the disincentives to service. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the concerns of the service member or potential service member that he or she will lose out on civilian job opportunities because of service to our country in uniform. The Servicemembers Civil Relief Act (SCRA) addresses the concerns of the service member that he or she will lose the opportunity to be heard in a civil or administrative proceeding back home because he or she is serving in uniform hundreds or thousands of miles away or that he or she will have to continue paying rent for an apartment that is no longer needed because he or she has enlisted or has been called to active duty.

I invite the reader’s attention to Law Review 14080 (July 2014), by Nathan Richardson<sup>27</sup> and myself. In that article we wrote:

Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country in the armed forces. In the All-Volunteer Military recruiting is a constant challenge. Despite our country’s current [2014] economic difficulties and the military’s recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component

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<sup>26</sup> Please see footnote 1.

<sup>27</sup> At the time (summer 2014), Nathan Richardson was an unpaid summer intern at the Service Members Law Center, of which I was the Director. Nathan is now a lawyer.

that has been unable to meet its recruiting quota for Fiscal Year 2014.

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicines for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There definitely is a compelling interest in the enforcement of USERRA.

As Nathan Richardson and I predicted in 2014, the services have suffered from recruiting shortfalls and this year is the most challenging year for military recruiting since the draft was abolished in 1973.

While I am very glad that Congress abolished the draft 51 years ago, conscription is constitutional, justified, and necessary when our nation is unable to recruit enough volunteers. In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.<sup>28</sup>

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20<sup>th</sup> Century) and by drafting young men into military service.<sup>29</sup> A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.<sup>30</sup>

No one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil

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<sup>28</sup> Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.

<sup>29</sup> No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

<sup>30</sup> *Arver v. United States*, 245 U.S. 366 (1918).

Relief Act (SCRA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 23rd anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, Active Component (AC) and Reserve Component (RC), have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real

cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 23 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 50 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor.<sup>31</sup>

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<sup>31</sup> See <https://thehill.com/policy/defense/236365-rangel-renews-call-for-war-tax-national-draft/>.



Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren.

You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

## **Please join or support ROA.**

This article is one of 2,200-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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).<sup>32</sup>

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.

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<sup>32</sup> 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 eight<sup>33</sup> uniformed services, you are eligible for membership in ROA,<sup>34</sup> 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  
Washington, DC 20002<sup>35</sup>

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<sup>33</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>34</sup> Spouses, widows, and widowers of past or present service members are also eligible to join.

<sup>35</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).

Here is a link to a *Military Times* article about *McCullough v. Oklahoma City Public Schools*:

<https://www.militarytimes.com/news/your-military/2024/05/30/feds-allege-school-district-barred-reservist-from-resuming-his-job/>

Here is a link to the complaint that DOJ filed on behalf of McCullough:

[https://www.justice.gov/opa/media/1353651/dl?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/opa/media/1353651/dl?utm_medium=email&utm_source=govdelivery)

We will keep the readers informed of developments in this important case.