

LAW REVIEW¹ 24038

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USERRA's Furlough or Leave of Absence Clause Has Been Applied to Local Police Officers. By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.3.2.10—Furlough or leave of absence clause.

1.4—USERRA enforcement.

1.6—USERRA statute of limitations.

1.8—Relationship between USERRA and other laws/policies.

***Myrick v. City of Hoover*, 69 F.4th 1309 (11th Cir. 2023).³**

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>.

³ The 11th Circuit is the intermediate federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia. This is a decision of a three-judge panel of the 11th Circuit. The three judges were Judge Charles R. Wilson and Judge Jill Anne Pryor of the 11th Circuit and Senior District Judge Anne

***Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424 (9th Cir. 2023).**⁴

***Travers v. FedEx Corp.*, 8 F.4th 198 (3rd Cir. 2021).**⁵

***White v. United Air Lines*, 987 F.3rd 616 (7th Cir. 2021).**⁶

USERRA’s “furlough or leave of absence” clause.

On 10/13/1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁷ USERRA was a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940.⁸

USERRA’s “furlough or leave of absence” provision reads as follows:

(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—

(A) deemed to be on furlough or leave of absence while performing such service; and

Conway, sitting by designation. Judge Conway wrote the opinion, and the other two judges joined in a unanimous panel decision.

⁴ The 9th Circuit is the intermediate federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, and Washington.

⁵ The 3rd Circuit is the intermediate federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the United States Virgin Islands.

⁶ The 7th Circuit is the intermediate federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

⁷ Public Law 103-353, 108 Stat. 3149. USERRA has been amended several times since 1994 and is now codified at 38 U.S.C. §§ 4301-35.

⁸ See *generally* Law Review 15067 (August 2015) for a detailed discussion of the federal reemployment statute.

*(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.*⁹

This language, or something very much like it, has been part of the reemployment statute since 1940. When Congress enacted USERRA in 1994, this provision was carried over without significant change.

Section 4331 of USERRA¹⁰ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The pertinent subsection of the DOL USERRA Regulation is as follows:

Which non-seniority rights and benefits is the employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

¹⁰ 38 U.S.C. § 4331.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be “comparable” to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.¹¹

In several of the amicus curiae (“friend of the court”) briefs that we have filed, and in several of our “Law Review” articles, we (the Reserve Organization of America) have taken the position that an employer must grant *paid* military leave to an employee who is away from his or her civilian job for a short period of military training or service if and to the extent that the employer grants paid leave for comparable periods of leave for non-military reasons (like jury service).¹² In 2021, the 7th Circuit (Chicago) and the 3rd Circuit (Philadelphia) agreed with our position. In 2023, the 9th Circuit (San Francisco) and the 11th Circuit

¹¹ 20 C.F.R. § 1002.150 (bold question in original).

¹² See *generally* Law Review 21067 (October 2021) and Law Review 21014 (March 2021).

(Atlanta) joined this chorus.¹³ The other nine circuits have not yet addressed the question.¹⁴

This issue is not limited to airlines and cargo carriers.

In Law Review 24037, the immediately preceding article in this “Law Review” series, I pointed out that USERRA’s “furlough or leave of absence” clause is not limited to pilots for airlines like United Airlines and Alaska Airlines. This clause also applies to stockers for companies like Walmart and Amazon. In *Myrick v. City of Hoover*,¹⁵ we see the application of this clause to police officers for the City of Hoover in Alabama.

Myrick v. City of Hoover

This case involved four plaintiffs, all of whom are police officers for the City of Hoover, Alabama.¹⁶ Thaddaeus Myrick and Nicholas Braden are members of the Alabama Army National Guard (ARNG). Jessie Popee is a member of the Alabama Air National Guard (ANG). Kenneth Fountain is a member of the United States Army Reserve (USAR). All four plaintiffs were away from their police officer jobs for short and long periods of military training and service. Myrick was deployed for 377 days to Afghanistan starting in 2017, and Braden was deployed to the same country for 354 days starting that same year. Popee was called to

¹³ See *White* and *Travers*, cited at the top of this article. The first three published Court of Appeals decisions deal with pilots for airlines (United Air Lines and Alaska Air Lines) and a cargo carrier (FedEx), but this legal principle is not limited to pilots. The 11th Circuit case deals with local police officers.

¹⁴ When the other circuits address this question, they will likely follow the lead of the 7th Circuit, the 3rd Circuit, the 9th Circuit, and now the 11th Circuit. If another circuit reaches the opposite conclusion on this point, that will set up a conflict among the circuits, and it would likely then be necessary for the Supreme Court to grant certiorari to resolve the conflict.

¹⁵ 69 F.4th 1309 (11th Cir. 2023).

¹⁶ All four of these individuals are eligible for membership in the Reserve Organization of America (ROA), but none of them are current members. We are trying to recruit them.

active duty six times, including 607 days starting in 2001, 691 days starting in 2004, and 426 days starting in 2008. Fountain was called to active duty for 1,752 days in 2007-11.¹⁷

In her scholarly opinion, Judge Conway cited the text and legislative history of USERRA as well as the Department of Labor (DOL) USERRA regulations, the preamble to those regulations, and the decisions of the 7th Circuit (*White*), the 3rd Circuit (*Travers*), and the 9th Circuit (*Clarkson*).¹⁸

In her opinion, Judge Conway also held:

The Supreme Court has long admonished courts to construe statutes protecting veterans liberally for the benefit of the veteran. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946). Congress adopted this rule of construction when it enacted USERRA. *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424, 429 (9th Cir. 2023). Thus, when two plausible interpretations of USERRA exist—one denying benefits, the other protecting the veteran—we must choose the interpretation that protects the veteran. *Travers*, 8 F.4th at 208 n.25 ("[A]ny interpretive doubt is construed in favor of the service member, under the pro-veteran canon."). In this case, the word "status" could refer to an employee's job position, or to the way the employer classifies the employee while on leave. The DOL selected the former interpretation, which prevents employers

¹⁷ It is possible to assert USERRA claims even years later because USERRA does not have a statute of limitations and it specifically precludes the application of other statutes of limitations. See Law Review 22018 (March 2022).

¹⁸ In her opinion, Judge Conway wrote: "Our conclusion is bolstered by the fact that Hoover's interpretation would split the circuits." *Myrick*, 69 F.4th at 1317. This statement buttresses the conclusion that I have expressed in previous Law Review articles that as new circuits are called upon to address questions about the application of the "furlough or leave of absence" clause they will likely follow the lead of the circuits that have already addressed these questions.

from skirting USERRA's protections by mischaracterizing military leave. *Cf.* § 1002.149; 70 Fed. Reg. at 75263. This interpretation aligns with USERRA's purpose and scheme. Therefore, it is permissible.¹⁹

The right to paid military leave under the “furlough or leave of absence” clause is not necessarily limited to drill weekends and traditional annual training tours.

The other three “furlough or leave of absence” clause cases cited have dealt with short periods of military training like drill weekends and annual training periods lasting two or three weeks. In this case (*Myrick*), the district court awarded and the appellate court approved ordering the employer (the City of Hoover) to grant paid military leave measured in the hundreds of days because “since 1994, Hoover has placed at least three police department employees on paid administrative leave lasting longer than 120 consecutive days.”²⁰

Q: Alabama state law gives National Guard and Reserve service members the right to 168 hours of paid military leave per year, and the City of Hoover gave this paid leave to the four plaintiffs in this case. Where does a federal court get the authority to order the City of Hoover to do more than state law requires?

A: USERRA is *a floor and not a ceiling* on the employment rights of service members and veterans. Section 4302 of USERRA provides:

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance),

¹⁹ *Myrick*, 69 F.4th at 1318.

²⁰ *Myrick*, 69 F.4th at 1313.

contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.²¹

The pertinent section of the DOL USERRA Regulation is as follows:

How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of

²¹ 38 U.S.C. § 4302.

work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.²²

State law requires the State of Alabama and its political subdivisions, including the City of Hoover, to grant employees who serve part-time in the Reserve Components of the armed forces 168 hours per year of paid military leave. Federal law (USERRA) requires all civilian employers to grant paid military leave to such employees for absences from work

²² 20 C.F.R. § 1002.7 (bold question in original).

that were necessitated by military training or service, if and to the extent that the employer grants paid leave for comparable periods of absence from the civilian job for non-military reasons, like jury service.

Q: I am a member of the Army National Guard of my home state. In addition to voluntary or involuntary active duty under title 10 of the United States Code and training duty under title 32, I am also subject to being called to state active duty by the Governor for state emergencies like tornadoes, floods, riots, and crime spikes in the subway system. How does USERRA, and specifically USERRA’s “furlough or leave of absence” clause, apply to me when I am called away from my civilian job for state active duty?

A: Starting on 1/5/2021, USERRA applies to state active duty under most circumstances.

When an individual (like Joe Smith) enlisted in the Army National Guard, he joined two overlapping but legally distinct entities. He joined the Army National Guard of the United States (ARNGUS), which is one of the Reserve Components of the United States armed forces. He also joined the Army National Guard of his specific State—let us say New York.²³ The Army National Guard of New York is the modern-day equivalent of the New York Militia.²⁴

In his ARNGUS (Federal) status, Joe can serve on active duty voluntarily or involuntarily under title 10 of the United States Code. In that

²³ Joe also has reinstatement rights under State law. Please see the “State leave laws” section at www.roa.org/lawcenter. You will find fifty-four articles about the State and territorial laws that protect the civilian jobs of National Guard members on State or territorial active duty.

²⁴ New York has another military organization, the New York Naval Militia (NYNM). The NYNM is a purely state entity. It does not receive federal funding, and its members are not subject to being called up by the Federal Government.

situation, USERRA protects his civilian job, just like a member of the Army Reserve or any other Reserve Component.

Joe is in a “Federal status” or “title 10 status” when he volunteers for or is called to Federal active duty under title 10. The rest of the time, he is in a “State status” or “title 32 status.” This includes the days when he performs no military duty, the days when he performs State active duty, and the days when he performs training or other duty under title 32 of the United States Code. Although Joe is in a State status when performing title 32 duty, *USERRA protects his civilian job at those times.*

Section 4303 of USERRA,²⁵ as amended, defines seventeen terms used in this law. When a statute defines a term, that definition controls for purposes of that statute, not the definition used somewhere else in the United States Code or the dictionary definition.

USERRA’s definition of “uniformed services” includes “the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty.”²⁶

Until recently, section 4303(13) of USERRA defined “service in the uniformed service” 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, a period for

²⁵ 38 U.S.C. § 4303.

²⁶ 38 U.S.C. § 4303(17).

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, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.²⁷

On 1/5/2021, President Trump signed into law the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.²⁸ Section 7004 of that new law amended section 4303(13) of USERRA²⁹ by inserting the following after “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 (50 U.S.C. § 1601 et seq.), and 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).”

Section 7004 also added a new subsection (15) to section 4303 of USERRA,³⁰ as follows:

²⁷ 38 U.S.C. § 4303(13).

²⁸ Public Law 116-315.

²⁹ 38 U.S.C. § 4303(13).

³⁰ Section 7004 of the amending legislation redesignated former 38 U.S.C. § 4303(15) (defining the term “undue hardship”) as 38 U.S.C. § 4303(16). With this change the definition of “uniformed services” previously at 38 U.S.C. § 4303(16) is now located at 38 U.S.C. § 4303(17).

The term “State active duty” means training or other duty, other than inactive duty, performed by a member of the National Guard of a State—(A) not under section 502 of title 32 or under title 10; (B) in the service of the Governor of a State; and (C) for which the member is not entitled to pay from the Federal Government.

Previously, USERRA did not protect the civilian jobs of National Guard members on State active duty—called by the Governor, under State authority, paid with State funds, for State missions. Effective 1/5/2021, USERRA applies to State active duty if the continuous period of State active duty lasts for fourteen days or more or if the State active duty is for a national emergency or major disaster declared by the President.³¹

If you are away from your regular civilian job for a period of state active duty, you may be entitled to paid military leave under USERRA’s “furlough or leave of absence” clause.

You need to read our “Law Review” articles to help you understand your legal rights under USERRA and other military-relevant laws and to help you figure out how to exercise and enforce your rights.

Please join or support ROA.

This article is one of 2,200-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.

³¹ If the period of State active duty is for 14 continuous days or more, the State active duty is protected by USERRA even if it is not for a national emergency or major disaster declared by the President. If the State active duty is for a national emergency or major disaster declared by the President, the State active duty is protected by USERRA even if the continuous period of State active duty lasts for fewer than 14 days.

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).³²

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

³² See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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 eight³³ 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
Washington, DC 20002³⁴

³³ Congress recently established the United States Space Force as the eighth uniformed service.

³⁴ You can also contribute on-line at www.roa.org.