

LAW REVIEW¹ 24048

October 2024

The SCRA Gives you the Right to a Continuance in your MSPB USERRA Case.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.1.3.8—USERRA applies to the Federal Government.

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

1.2—USERRA forbids discrimination.

1.6—USERRA and statutes of limitations.

1.8—Relationship between USERRA and other laws/policies.

4.3—SCRA right to a continuance and protection against default judgment.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,200 "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 (VRRA—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 VRRA 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 VRRA 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 a Corporal in the Marine Corps Reserve³ and a member of the Reserve Organization of America (ROA).⁴ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), especially Law Review 23024 (May 2023) and Law Review 20032 (March 2020), about USERRA’s enforcement mechanism for cases against federal agencies as employers.

I was a federal civilian employee for 11 months and 26 days, and then I was fired. During my brief federal service, my direct supervisor and his supervisor gave me a hard time about my absences from work for my USMCR training requirements, and the agency fired me because they were annoyed with me for exercising my USERRA rights.

I want to contest the firing, contending that firing me violated USERRA. The agency’s personnel office told me that because I was still a “probationary” employee at the time I was fired, the agency can fire me for any reason or no reason and the firing is not reviewable. The agency quoted this statement from the USAJOBS⁵ website:

If you're a new employee or supervisor in the Federal Government, you may have to complete a one-year probationary period. Some agencies may require a longer probationary period and other agencies may not require it at all.

During the “probationary period” your employer will decide if you're the right person for the job. If you're not the right person

³ This article is based on a real situation that has been brought to my attention, but I have changed several of the facts to disguise the identity of the individual.

⁴ The Reserve Officers Association was founded in 1922 and chartered by Congress in 1950. In 2018, the members amended the organization’s constitution and made enlisted personnel, as well as officers, eligible for full membership rights, including voting and running for office. We adopted the “doing business as” name of Reserve Organization of America to emphasize that we represent and seek to recruit as members military personnel of all ranks, from E-1 to O-10.

⁵ USAJOBS is operated by the United States Office of Personnel Management (OPM), which sets personnel policies for the Executive Branch of the Federal Government.

for the job, the employer can fire you at any point during the probationary period.⁶

The personnel office manager has insisted that the fact that I was fired five days before the first anniversary of my hiring means that my firing cannot be reviewed, but in your Law Review 20032 (March 2020) you wrote:

First, you are correct that the fact that you were still in the initial probationary period, as a new federal employee, when you were fired does not insulate the employer's action from review under USERRA. The Department of Labor (DOL) USERRA regulation provides:

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

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.⁷

⁶ See <https://www.usajobs.gov/Help/working-in-the-government/fair-and-transparent/probationary-period/>.

⁷ 20 C.F.R. 1002.41 (bold question in original). See also Law Review 17009 (February 2017).

Second, the MSPB has jurisdiction to hear and adjudicate a claim that a federal executive agency has violated USERRA, under section 4324 of USERRA. That section provides:

(a)

(1) A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall—

(i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

(ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office

to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)

(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.⁸

⁸ 38 U.S.C. 4324.

The jurisdiction of the MSPB is not limited to cases involving persons who can otherwise appeal firings to the MSPB.

Do you adhere to what you wrote in Law Review 20032?

A: Yes. If the agency's decision to fire you was motivated by your supervisors' annoyance with your membership in the USMCR and your absences from work that were necessitated by that membership, the firing violated USERRA, and the MSPB has the authority and responsibility to adjudicate your claim that the firing violated USERRA, without regard to your probationary status at the time of the firing.

Q: As you suggested in Law Review 23024, I retained an attorney and initiated an action in the Merit Systems Protection Board (MSPB). What do we need to prove to prevail in this MSPB action?

A: The decision to fire you likely violated section 4311 of USERRA, which provides:

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment*, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise

participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.⁹

⁹ 38 U.S.C. 4311 (emphasis supplied).

To prevail in your section 4311 claim, you are not required to prove that the firing was motivated *solely* by your military service and obligation to perform service; you are only required to prove that your military service and obligations were *a motivating factor* in the employer's decision to fire you. If you prove that your USMCR service was a motivating factor in the decision to fire you, the *burden of proof* shifts to the employer, to prove that it would have fired you anyway for lawful reasons unrelated to your service. You need not have an employer admission or a "smoking gun."¹⁰

Q: The MSPB Administrative Judge (AJ) to whom my case was assigned has moved the case along quickly, and she has set the case for trial on 10/15/2024. I have just learned that I am being called to active duty, with my USMCR unit, for one year, from 10/1/2024 until 9/30/2025. By the time that the MSPB trial is expected to occur, I will be deployed to a location that is thousands of miles away and it is most unlikely that my commanding officer will permit me to take leave to travel home for this MSPB hearing. Does USERRA give me the right to a continuance (delay) in the hearing?

A: You have the right to a continuance under the Servicemembers Civil Relief Act (SCRA). Here is the pertinent SCRA section:

(a) Applicability of section. This section applies to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section—

(1) is in military service or is within 90 days after termination of or release from military service; and

¹⁰ Please see Law Review 17016 (March 2017).

(2) has received notice of the action or proceeding.

(b) Stay of proceedings.

(1) Authority for stay. At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.

(2) Conditions for stay. An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

(c) Application not a waiver of defenses. An application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defense (including a defense relating to lack of personal jurisdiction).

(d) Additional stay.

(1) Application. A servicemember who is granted a stay of a civil action or proceeding under subsection (b) may apply for an additional stay based on continuing material effect of military

duty on the servicemember's ability to appear. Such an application may be made by the servicemember at the time of the initial application under subsection (b) or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required under subsection (b)(2) shall be included in an application under this subsection.

(2) Appointment of counsel when additional stay refused. If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.

(e) Coordination with section 201. A servicemember who applies for a stay under this section and is unsuccessful may not seek the protections afforded by section 201 [50 USCS § 3931].

(f) Inapplicability to section 301. The protections of this section do not apply to section 301 [50 USCS § 3951].¹¹

It is important that you and your lawyer follow closely the requirements of section 3932, with regard to the content of the statement of your commanding officer concerning your unavailability for the trial scheduled for 8/15/2024.

Q: Section 3932 refers to “the court.” Is the MSPB a court? Does section 3932 apply?

A: The SCRA's definitions section defines the word “court” as follows: “The term ‘court’ means a court *or an administrative agency* of the United States or of any State (including a political subdivision of a State), whether or not a court or an administrative agency of record.”¹²

¹¹ 50 U.S.C. § 3932. *See generally* Law Review 22023 (April 2022). That article is by Colonel Mark Sullivan, USA (ret.), an attorney in North Carolina who is the nation's leading expert on family law as applied to service members and their spouses.

¹² 50 U.S.C. § 3911(5) (emphasis supplied).

Q: What is likely to happen next?

A: The AJ will probably dismiss your case *without prejudice*, and you and your lawyer can refile it after you return from the mobilization. It is essential that the AJ dismiss the case *without prejudice*. If she dismisses it *with prejudice* your case is over and cannot be refiled.

Q: By the time that I return from my deployment and refile my case in the MSPB, the statute of limitations may have run. How does this work?

A: USERRA does not have a statute of limitations and it precludes the application of other statutes of limitations. The pertinent USERRA section is as follows: “If any person seeks to file a complaint or claim with the Secretary [of Labor], *the Merit Systems Protection Board*, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.”¹³

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.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the

¹³ 38 U.S.C. § 4327(b) (emphasis supplied).

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 commanded American troops in the recently concluded “Great War.” One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members,

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

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,¹⁶ 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 20002¹⁷

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

¹⁶ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

¹⁷ You can also contribute on-line at www.roa.org.