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## **Reporting Back to Work After Weekend Drills**

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Several ROA members have contacted me concerning the recent case of *Gordon v. Wawa Food Markets*, 388 F.3d 78 (3rd Cir., 2004). Some have suggested that this case is inconsistent with what I have written in some of my Law Review articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I do not think it is inconsistent, but this is an important case that certainly deserves a mention in this column.

This case is an excellent example of the old adage that “hard cases make bad law.” Here are the tragic facts, as set forth in the plaintiff's complaint. In 2000, Willie Gordon was a member of the United States Army Reserve, drilling in Virginia. He lived in Vineland, N.J., and he worked for Wawa Food Markets, Inc., at a store in Vineland. September 17, 2000, on his way home from weekend Army Reserve training in Virginia, Gordon stopped by the Vineland store to pick up his paycheck and his work schedule for the coming week.

According to the complaint, the store manager ordered Gordon to work the late shift at the store that evening and threatened to fire him if he refused. Gordon worked the late shift at the store and then drove home. While driving home, he lost consciousness at the wheel of his car and crashed, resulting in his death.

Mrs. Wanda Gordon is Willie Gordon's mother and the administratrix of his estate. She filed suit against Wawa Food Markets, alleging that the employer violated USERRA by requiring Gordon to work the Sunday night shift and that the accident and the death were the proximate result of this USERRA violation. The Federal District Court dismissed the suit under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The District Court held that, even assuming all facts to be as stated by Mrs. Gordon in her complaint, the law does not authorize the relief sought—money damages for the death of Willie Gordon. The U.S. Court of Appeals for the 3rd Circuit affirmed the dismissal.

Under Section 4312(e)(1)(A)(i) of USERRA, 38 U.S.C. 4312(e)(1)(A)(i), an employee completing a period of uniformed services of fewer than 31 days is required to report for work at the civilian job “not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person's residence.” Willie Gordon completed his weekend drills in Virginia late Sunday afternoon and then drove home to New Jersey, arriving some time Sunday evening. He would have been within his rights under USERRA to wait until his first regularly scheduled work period on Monday to report back to work.

Unfortunately, Mr. Gordon reported for work at his civilian job Sunday evening, perhaps because the supervisor had threatened to fire him if he did not work that Sunday evening shift.

The Court of Appeals held: "As the District Court concluded, Section 4312(e) is written entirely in terms of an employee's duties, as opposed to an employer's obligations. There is no way to construe the statutory language as conferring a substantive right to eight hours of rest for the returning employee."

What can we learn from this tragedy? We can learn that it is more important than ever to get the word out to National Guard and Reserve members about their legal rights and obligations under USERRA. If Willie Gordon had been better informed of his legal rights, he probably would have refused to work the Sunday evening shift, and this matter could have been handled as a standard USERRA case, not a wrongful death case. And maybe in retrospect we can say that Mr. Gordon should not have stopped off at the store on the way home from his weekend drills Sunday evening.

I have long been aware of the importance of knowledge about USERRA among National Guard and Reserve members, which is why I initiated this Law Review column in 1997. The archive of past Law Reviews is on the ROA Web site, [www.roa.org](http://www.roa.org). On the home page, click on "Legislative Affairs," then on the pop-up menu select "ROA Law Reviews." I invite your attention specifically to Law Reviews 7, 70, and 91.

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