LAW REVIEW 15023[1]

March 2015

Please Don't Take away my LQA!

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

1.1.1.8—USERRA applies to Federal Government
1.2—USERRA forbids discrimination
1.3.1.2—Character and duration of service
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies
9.0—Miscellaneous
10.2—Other Supreme Court cases

Q: I am an Army Reserve nurse and a life member of ROA. I graduated from college and became a Registered Nurse (RN) in 1995, at which time I was commissioned a Second Lieutenant in the Army. I served on active duty for ten years and left active duty in 2005 and then affiliated with the Army Reserve. I returned to my home town and accepted a nurse job at the same hospital where I was born in 1973.

I was active in the Army Reserve after I took the civilian job in 2005, and the Chief Nurse of the hospital continually gave me a hard time about my drill weekends and annual training. I contacted the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR) and a local ESGR volunteer explained to the Chief Nurse that a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA) gave me the job-protected right to be away from my civilian job for Army Reserve training and duty. The local ESGR volunteer also arranged for the Chief Nurse to participate in an ESGR "boss lift" to see what Reserve Component (RC) service members contribute to national defense. That seemed to mollify the Chief Nurse, at least for awhile.

In January 2007, I received notice that I would likely be mobilized (along with my Army Reserve medical unit) for deployment to Iraq, and I immediately passed along this information to the Chief Nurse, who reacted badly. For the next six months, she continually harassed me about the Army Reserve and pressured me to resign from my civilian job at the hospital, but I hung tough until July, when I reported to active duty with my unit. I was on

---

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

[2] Captain Wright is ROA's Director of the Service Members Law Center (SMLC). He can be reached by telephone at (800) 809-9448, ext. 730. His e-mail is SWright@roa.org.

active duty for a year, and most of that time I was in Iraq, treating American and Coalition troops who were wounded in action.

I was released from active duty in July 2008 and promptly applied for reemployment at the civilian hospital. I was reemployed, but not without having to retain a lawyer and threaten to sue the hospital for violating USERRA. For the next three years, I continued to be harassed by the Chief Nurse about my Army Reserve activities.

In early 2011, I learned of an opportunity to go to Afghanistan for a one-year voluntary active duty period, as a nurse, and I applied for the opportunity. I did not tell the Chief Nurse that I had applied, but I told her as soon as I learned that my application had been accepted. Needless to say, she reacted very badly to the news that I would be leaving for military service again, and this time voluntarily.

In July 2011, at the end of my last day of work at the civilian hospital, several of my colleagues at the hospital invited me to dinner at a nice restaurant and honored my Army service and my decision to deploy to a combat zone to treat wounded warriors yet again. The Chief Nurse burst in to this private party and berated my colleagues for honoring my Army service. She told me and my colleagues that I was "disloyal" to the hospital for having volunteered to go off and "play soldier" yet again. She said emphatically that my job at the hospital was "over" and "don't you ever darken my door again."

I served for a year in Iraq, from July 2011 until July 2012. At the end of that year of active duty, I dreaded yet another confrontation with the Chief Nurse at the civilian hospital, so I volunteered for a second year of active duty at a DOD hospital in Germany. That period of active duty brought me to July 2013, at which time I accepted a civilian nurse job at the same DOD hospital in Germany. I am still working there and am enjoying the job. I am continuing my Army Reserve career, and at this point I have more than 13 years of active duty so I have so much invested in the Army Reserve that I cannot contemplate leaving short of retirement.

When I was getting ready to leave active duty in July 2013, I had long discussions with the civilian personnel office at the DOD hospital where I was serving. The civilian personnel office offered me *in writing*, and I accepted, an attractive compensation package, including a Living Quarters Allowance (LQA) amounting to tens of thousands of dollars per year. With the LQA, the compensation package is quite adequate. Without the LQA, I never would have accepted this job. I would have returned to the United States, either to assert my USERRA rights at the civilian hospital in my home town or to find work at some other civilian hospital.

Recently, the DOD hospital where I work conducted an audit of LQA accounts, as directed by higher headquarters. My LQA was cut off, and I was told that I must repay the LQA payments that I received between July 2013 and December 2014. I was told that I am not eligible for LQA because I was already outside the United States when I was offered and when I accepted this civilian job. I was told that LQA is only for the person who leaves the United States to take a DOD civilian job outside the United States. This is not fair! I was already outside the

United States *because I was on active duty in the Army.* I think that depriving me of the LQA because of my having been on active duty violates USERRA. What do you think?

I have read with great interest your "Law Review" articles about USERRA. Please comment in detail on the USERRA violations by the civilian hospital in my home town and about whether I have a USERRA claim for the LQA.

USERRA and your home town civilian hospital

A: First, the attitude of the Chief Nurse to your Army Reserve service is totally unsatisfactory but all too common. More than 905,000 RC personnel have been called to the colors since the terrorist attacks of September 11, 2001, including more than 350,000 who have been called more than once. Many civilian employers (federal, state, local, and private sector) are tired of the burdens that employing RC personnel puts on the civilian employer, but USERRA is clear and the employer does not have a choice and does not have any legitimate basis to complain.

Here at ROA headquarters, the treasured Minuteman Memorial Building, we have the Minuteman Statue—donated to ROA by Brigadier General and Mrs. Roger L. Zeller as a memorial to Lieutenant Edwin F. Dietzel. The statue sits on a marble pedestal. On the pedestal, these words are inscribed: "Each citizen of a free government owes his services to defend it." These words are attributed to General George Washington in 1783.

For most of our nation's history, we had a tiny standing Army of professional career soldiers, and a Navy that was only slightly larger. When conflict arose, the standing Army was quickly supplemented by calling up state militia forces, the citizen soldiers of that era. For a major military conflict, our nation established a draft and conscripted young men into service. This pattern held for the Civil War, World War I, World War II, the Korean War, the Vietnam War, and the first 28 years (1945-73) of the Cold War competition with the Soviet Union.

All of that changed in 1973, when Congress abolished the draft. Today, the United States military, Active Component and Reserve Component, is the best motivated, best trained, best led, best equipped, and most effective military in the world, and perhaps in the history of the world. Few in today's military would contemplate returning to the draft. The vast majority of our population is not asked to participate in the defense of the nation, beyond the payment of taxes.

Today's military establishment, including the National Guard and Reserve, amounts to less than ¾ of 1% of the U.S. population. It is largely the same families who serve, from one generation to the next. Most civilian employers, and most who serve in positions of authority like the Chief Nurse, have never served in the military, and no one in their families and none of their close friends have ever served. They don't have a clue about the kind of service and sacrifice that it takes to defend our country and our way of life.

In a speech to the House of Commons on August 20, 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, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few.

Prime Minister Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to the United States military in the Global War on Terrorism. It is these few, these hardy few, who have prevented a recurrence of the horrors of September 11, by their prowess and their devotion.

According to the Department of Defense, 905,045 National Guard and Reserve personnel have been called to the colors since September 11, 2001, our generation's "date which will live in infamy." Some have been called five or more times, and their civilian employers are tired of the "burden" and seek to shed the burden by flouting USERRA.

To our nation's employers—I say that your burden, while not inconsiderable, pales in comparison to the burden, and sometimes the ultimate sacrifice, borne by those in uniform. Because our country abolished the draft 42 years ago, we are not calling you to involuntary military service, and we are not calling your sons or daughters. That entire burden is borne by that tiny sliver of the population that volunteered to serve, in the Active Component or the Reserve Component. Employers—do not complain about the burden on you—honor and celebrate the much greater burden voluntarily undertaken by those who serve. When you find serving RC members in your work force or among job applicants, you should comply with USERRA cheerfully, and you should go above and beyond USERRA in supporting those who serve.

The reemployment statute is not new—it is 75 years old. It was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men, including my late father, for World War II. A year later, as part of the Service Extension Act of 1941, Congress expanded the reemployment provision to make it apply to voluntary enlistees as well as draftees. Congress strengthened the law when it enacted USERRA in 1994, but you should think of this law as 75 years old, not 20. This law is an integral part of the fabric of our society.

ROA established the Service Members Law Center (SMLC) almost six years ago, in June 2009, and I am the first Director. I am here at my post answering calls and e-mails during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to encourage RC personnel to call me or e-mail me from the privacy of their own homes, not from their civilian jobs.

As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer. Moreover, if the employer is annoyed with you because you have been called to the colors five times since September 11, 2001 and expect to be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking. I think that it is so important that RC personnel call me or e-mail me from home rather than work that I am giving up two evenings per week to make it possible for them to communicate with me from the privacy of their own homes, outside their civilian work hours.

ROA is unique in giving RC personnel the opportunity to speak to a live human outside regular business hours. Neither ESGR, nor the Department of Labor (DOL), nor any other government agency or military association offers this after-hours service.

I have been dealing with USERRA and the 1940 reemployment statute for more than 32 years, and I have made this issue (along with military voting rights) the focus of my legal career. I developed the interest and expertise in this law during the decade (1982-92) that I worked for DOL as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Bill Clinton signed on October 13, 1994 (Public Law 103-353) was 85% the same as the Webman-Wright draft.

I have also dealt with the reemployment statute as a judge advocate in the Navy and Navy Reserve, as an attorney for ESGR, as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. In June 2009, I retired from private practice and joined ROA's full-time staff as the first Director of the SMLC.

As I explained in Law Review 1281 and other articles, you have the right to reemployment after a period of uniformed service if you meet the five USERRA conditions:

a. Left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Gave the employer prior oral or written *notice.* You do not need the employer's permission, and the employer does not get a veto.
c. You have not exceeded the cumulative five-year limit on the duration of the period or periods of service. More on this below.
d. You have been released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from the period of service, you have made a timely application for reemployment with the pre-service employer. After a period of service of 181 days or

more, you have 90 days to apply for reemployment.[3] Shorter deadlines apply after shorter periods of service.

As is explained in Law Review 201 and other articles, the five-year limit is cumulative with respect to the employer relationship for which you seek reemployment, and there are nine exemptions—kinds of service that do not count toward exhausting your five-year limit. Your ten years of active duty from 1995 to 2005 do not count toward your five-year limit at the civilian hospital, where you started work in 2005. During your work at the hospital, your drill weekends and annual training tours do not count toward your five-year limit, and your 2007-08 involuntary call to active duty does not count toward your limit. The two-year period of voluntary active duty, from July 2011 to July 2013, may or may not have counted, depending upon the wording of the orders, but even if that period counted you were well within the cumulative five-year limit with respect to the home town hospital. If you had made a timely application for reemployment at the home town hospital within 90 days after you left active duty in July 2013, you would have had the right to reemployment under USERRA, but since you did not apply for reemployment within 90 days after you left active duty, that issue is now moot.[4] You received a fresh five-year limit when you began your federal civilian career in July 2013.

The LQA issue

I think that you can make a good argument that depriving you of the LQA, especially retroactively, is a violation of section 4311 of USERRA, which provides:

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(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

[3] 38 U.S.C. 4312(e)(1)(D).

[4] The Chief Nurse's harassment of you because of your Army Reserve service was a clear and egregious USERRA violation. I invite your attention to Law Review 14091 (December 2014), by Brian J. Lawler, Esq. Brian is a Lieutenant Colonel in the Marine Corps Reserve and a member of ROA. He represents service members in USERRA cases around the country and has had many notable successes. He is on the attorney referral list that I maintain here at the SMLC.

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.

38 U.S.C. 4311.

Section 4303 of USERRA defines 16 terms, including the term “benefit of employment,” which is defined as follows:

(2) The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. 4303(2).

This definition is certainly broad enough to include your LQA payments. Depriving you of the LQA *because you served on active duty immediately before you started this civilian DOD job* violates section 4311(a) of USERRA.

Your civilian employer is likely to argue: We did not deprive her of the LQA because she served on active duty before she was hired. We deprived her of the LQA because she was already outside the United States at the time she applied for and accepted the civilian job, as we were required to do by the pertinent regulation. I think that the Merit Systems Protection Board (MSPB) is likely to hold that this proposed distinction is nonsensical and unlawful, or if the

MSPB does not so hold the United States Court of Appeals for the Federal Circuit[5] will reverse the MSPB on this point.

I invite the reader's attention to *Erickson v. United States Postal Service,* 571 F.3d 1364 (Fed. Cir. 2009). In that case, the MSPB held that the Postal Service did not violate the USERRA rights of Sergeant Major Erickson when it fired him because of his lengthy (but not beyond the five-year limit) absence from his civilian Postal Service job. The MSPB drew a distinction between firing an employee because of his or her *service in the uniformed services,* which is unlawful under section 4311, and firing the employee because of his or her *absence from the civilian job,* which does not violate section 4311, according to the MSPB.

On appeal, the Federal Circuit forcefully rejected this nonsensical distinction: "We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of absence when that absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA." *Erickson,* 571 F.3d at 1368.

Applying that logic to your situation, I would argue that it is unreasonable and unlawful to try to make a distinction between denying you LQA because of your *presence in Europe* before you were hired for the civilian DOD job and denying you LQA because you *were on active duty* before you were hired for the civilian DOD job, when your presence in Europe in 2013 was the direct and unavoidable consequence or your being on active duty at the time.

I think that you have a good USERRA argument, but I hope that it will not come to that. I hope that this injustice (which affects many more persons than just you) can be brought to the attention of the new Secretary of Defense and that he will direct that the LQA regulation be rewritten or that it be applied in a way that does not run afoul of USERRA and that is supportive of those who serve and have served our country in uniform.

USERRA's very first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[6] If the Federal Government is to be the model employer, DOD should be triply the model employer. Without a law like USERRA, DOD and the services would be unable to recruit and retain sufficient personnel for the armed forces. When DOD flouts USERRA with respect to its own civilian employees, it makes it exceeding difficult for ESGR (a DOD component) to argue that other federal agencies, state and local governments, and private employers should support employees and potential employees who serve as RC members.

---

[5] The Federal Circuit is the specialized federal appellate court that sits here in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

[6] 38 U.S.C. 4301(b).

Q: When I accepted this DOD civilian job in July 2013, LQA was part of the compensation that I was offered, in writing. I never would have accepted this job if LQA had not been part of the compensation. Without the LQA, my compensation package is grossly insufficient—much less than what I had been earning at the civilian hospital in my home town and much less than I could earn at any civilian hospital in the United States.

The way that I see it, I have a valid, enforceable contract with DOD—I work as a civilian nurse at this DOD hospital, and I am entitled to the compensation that I was promised, including LQA. I have lived up to my end of the contract, and I have a right to demand that DOD live up to its end. What do you think of this contract argument?

A: This "I have a contract and I am going to enforce it" argument works well against private employers. Unfortunately, that argument does not work against a federal agency. Federal civilian employees and military personnel receive only the compensation and benefits that Congress had provided by law. Every day, federal recruiters and personnel offices make promises they cannot keep and that they have no authority to make. Unfortunately, those promises are not binding on federal agencies.

I invite your attention to *Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990) and *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380 (1947). I discuss the implications of these two important Supreme Court cases in Law Review 1104 (January 2011).