

My Employer Fired me when I Was on the way out the Door

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Update on Sam Wright

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Q: I am a Captain in the Army Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 16110 (October 2016). That article caught my eye because what happened to Lieutenant Ziober (the plaintiff in *Ziober v. BLB Resources*) resembles what happened to me recently.

I started a new job with a new employer (let’s call it Daddy Warbucks International or DWI) on January 1, 2016. During the nine months that I worked for DWI, my direct supervisor and his supervisor gave me a continuing hard time about my Army Reserve service and the times that I have been away from work for Army Reserve training, although these absences were clearly protected by USERRA.

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1500 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, 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. I am the author of more than 1300 of the articles.

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. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 34 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 at Tully Rinckey PLLC (TR), 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. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

In late August, I learned that my Army Reserve unit was to be mobilized on October 1, and I immediately shared that information with my DWI supervisor and the DWI personnel office. My supervisor then pressed me to get out of the mobilization somehow. He told me that if I was “loyal” to the company I would figure out some way to avoid reporting to military duty. He even suggested that I should feign illness or injury. I patiently explained to him that I was legally and morally obligated to report to active duty with my unit, that I would not ask to be excused from the mobilization, and that if I did ask the Army would certainly deny my request.

Friday, September 30 was my last day at work at DWI, and I reported to active duty the next morning, as ordered. On that Friday, several of my DWI colleagues took me to lunch, honored me for my Army service, and told me that they would be praying for me during my deployment. When we got back from lunch, the company owner called me into his office and told me that I was fired and that there would be no job for me at DWI when I returned from my year-long deployment to Southwest Asia (SWA).

I protested that the firing was unfair and unlawful because it was done on the very eve of my departure for active duty. He told me that I was an “employee at will” and that the company can fire me for any reason or no reason and that I have no legal recourse. He also said that I was guilty of “misconduct” but he refused to say what the misconduct was.

I think that he made up the “misconduct” charge to mask the fact that he was firing me as I left to report to active duty to avoid the inconvenience of having to reinstate me upon my return from active duty, probably in October 2017, when I complete my 12-month recall to active duty. Ironically, I do not want to return to DWI. I am tired of being harassed about my Army Reserve service, and the job has been disappointing in other ways as well. There are four other companies in our city in essentially the same business, and I think that I can find a job with one of those companies that pays almost as much or maybe a little more.

My concern is about answering the “have you ever been fired” question as I am job hunting. I have never had a problem answering “no” to that question during previous times when I have been looking for a job. Now, I suppose that I will need to answer “yes” and offer a long explanation that prospective employers probably won’t want to hear.

Have my USERRA rights been violated? What, if anything, can I do about this situation now, while I am on active duty in SWA?

A: Yes. By firing you on the eve of your mobilization, DWI violated section 4311(a) of USERRA, which provides:

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.³

By firing you on the eve of your mobilization, DWI denied you “retention in employment” on the basis of your pending service and obligation to perform service. Moreover, section 4316 of USERRA provides that a person who is away from a civilian job for voluntary or involuntary service shall be “deemed to be on furlough or leave of absence while performing such service.”⁴

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA⁵ and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in 1940. USERRA’s legislative history refers to the “furlough” clause as follows:

Section 4315(b) [later renumbered as 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily-mandated military leave of absence while away from work, regardless of the employer’s policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with a promise of reemployment, is of no effect. *See Green v. Oktibbeha County Hospital*, 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders v. People Express Airlines, Inc.*, 595 F. Supp. 1512, 1518 (D.N.J. 1984), *affirmed*, 770 F.2d 1078 (3rd Cir. 1985).⁶

DWI clearly violated USERRA when it fired you on your last day of work before you reported to active duty. The problem is that there is no meaningful remedy available to you at this point, even if you sue and win. USERRA provides as follows concerning the relief that a federal court can award to a successful USERRA plaintiff:

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.⁷

³ 38 U.S.C. 4311(a).

⁴ 38 U.S.C. 4316(b)(1)(A). This provision is called the “furlough or leave of absence clause.”

⁵ Public Law 103-353, 108 Stat. 3150.

⁶ House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in full in Appendix C-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 679 of the 2016 edition of the *Manual*.

⁷ 38 U.S.C. 4323(d)(1).

The court can order the employer to put you in the “statutorily-mandated military leave of absence status” referred to in USERRA’s legislative history. But putting you in that status provides you no tangible benefit, and it is not worth the expense of hiring a lawyer to obtain such meaningless relief.

Because you were fired on the very day that you were leaving the job in any case, you lost no wages or salary, so no monetary relief can be granted. The employer can be ordered to double the damages for violating USERRA willfully, but two times nothing is nothing.

I suggest that you contact the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR). I hope that the ESGR ombudsman will talk sense into the employer and that the employer will withdraw the firing and the misconduct allegation. If ESGR is unable to help you, I suggest that you contact the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). You can make a written USERRA complaint from SWA at the DOL-VETS website, which is www.dol.gov/vets.

In the meantime, I suggest that you keep to yourself the fact that you do not want to return to work for DWI. When you leave active duty and return home next October, you should immediately apply for reemployment at DWI, if for no other reason than to get the employer to deny the application and set up a ripe controversy. As I have explained in Law Review 15116 (December 2015) and many other articles, making a timely⁸ application for reemployment is one of the five conditions that the returning service member must meet to have the right to reemployment under USERRA.

If (as is very likely) the employer denies or ignores your application for reemployment, you can then seek and accept another job at another nearby company. If by that time the company is lawyered up and decides to grant your application for reemployment, you can always say “thanks but no thanks” and take a job elsewhere.

Please contact me again in October, after you are off active duty, and I will consider further the steps that you might take. Good luck, and thank you for your service to our country in the Army Reserve.

⁸ After a period of service of 181 days or more, the returning service member must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.