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Apply for Reemployment when you Return from Military Service although the Employer Purportedly Fired you on the way out the Door

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[Update on Sam Wright](#)

1.2—USERRA forbids discrimination

1.3.1.3—Timely application for reemployment

1.4—USERRA enforcement

Q: I am a Sergeant in the Army Reserve and a member of the Reserve Organization of America.³ I have read with great interest many of your “Law Review” articles about the

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1800 “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 Spouse 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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1600 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. For 43 years, I have worked 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 36 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 SWright@roa.org.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard

Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I work for an intermediate-size local company, let's call it Jack Smith, Inc. Mr. Smith, the founder and owner of the company, has given me a hard time about my absences from work for Army Reserve training and service ever since I started at the company in January 2015, although those absences have all been clearly protected by USERRA. Three times, I have asked the Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR) to intervene on my behalf, but Mr. Smith has refused to meet with ESGR representatives.

In the fall of 2018, I learned that my Army Reserve unit was being called to active duty for a year, starting in January 2019. I immediately shared that information with Mr. Smith. Predictably, he reacted very negatively, and he harassed me every day at work until I left in January to report to active duty as ordered.

Friday, January 11, 2019 was my last day at work, before I reported to active duty on Monday, January 14. At the end of the workday, several of my friends at work took me to dinner at a nice restaurant. Mr. Smith barged into the restaurant and told me that I was being "disloyal" to the company by putting the Army above the company. He said: "Don't you ever darken the door of my store again. You are fired." He made a most unpleasant scene, and his actions added to my stress at what was already a very stressful time.

On the following Monday, I reported to pre-deployment training and then to a classified location in the Middle East, where I still am. Although I have no access to telephone service and only limited Internet service, I have made a few inquiries with other local companies, looking for a job when I return from my deployment in January 2020. No potential employer has responded to my inquiries. I believe that Mr. Smith has been badmouthing me when he has been contacted by other local employers.

When I left town in January 2019, I certainly did not want to return to work for Jack Smith, Inc., but I need to think about that now that I am having difficulty finding other employment. There are only a handful of potential employers in my small city. Another consideration is my 401(k) plan at Jack Smith, Inc. I have contributed to it since January 2015, and the employer has matched my contributions. I am fully vested after five years of employment, or in January

Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

2020. I would like to return to work at least briefly, so that I can take the 401(k) money with me to a new job.

My wife visited a local attorney about this matter, and the attorney advised my wife that I should apply for reemployment at Jack Smith, Inc. despite all that has happened. What do you think?

A: I agree with the advice that you should apply for reemployment at Jack Smith, Inc., if only as a way of improving your bargaining leverage.

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you (or any service member or veteran) must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.
- b. You must have given the employer prior oral or written notice that you were leaving the job to perform service.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.⁴
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁵
- e. After release from the period of service, you must have made a timely return to work or application for reemployment.⁶

You already meet the first two conditions; in that you left your job to perform uniformed service and you gave the employer prior notice. Barring some unforeseen event, you will be released from active duty without a disqualifying bad discharge from the Army. Because you were called to active duty involuntarily, this year of active duty does not count toward your five-year limit, and you are not close to the limit even if this year counts. You can apply for reemployment, and I strongly suggest that you do so. Yes, Mr. Smith will almost certainly reject

⁴ Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions to the limit—that is, there are nine kinds of service that do not count toward exhausting your limit.

⁵ If you receive a punitive discharge by court martial or administrative discharge characterized as “other than honorable,” you will not have the right to reemployment. See 38 U.S.C. 4304.

⁶ After a period of service of 181 days or more, you have 90 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). After a period of service of 31-180 days, you have 14 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(C). After a continuous period of service of fewer than 31 days, you must report for work at the start of the first regularly-scheduled work period on the first day after your release from the period of service and the time reasonably required for safe transportation from the place of service to your residence plus eight hours (for rest) after your arrival at home. See 38 U.S.C. 4312(e)(1)(A). In determining the deadline for you to apply for reemployment, it is the *actual period of service*, not the expected period of service, that controls.

your application, but submitting a timely application for reemployment is a box that you need to fill.

You have two potential causes of action under USERRA. You can argue that the firing on 1/11/2019 violated section 4311⁷ because it was motivated by your performance of uniformed service. You can also argue that failing to reemploy you upon your application in early 2020 violated section 4312.⁸ Section 4312 cases are inherently easier to prove—you only need to prove that you meet the five simple conditions. If you submit a timely application for reemployment, there seems to be no doubt that you meet the conditions.

Q: If I sue Jack Smith, Inc. and win, what remedies can the court award to me?

A: Section 4323 of USERRA provides:

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.⁹

This means that when you win the court will order Jack Smith, Inc. to reemploy you and to compensate you for the pay and benefits you lost because you were not promptly reemployed in January 2020. If the court finds that the employer violated USERRA willfully,¹⁰ the court will order the employer to pay you liquidated damages in the amount of the actual damages, thus doubling the award.

Q: But I really don't want to go back to work for Jack Smith, except perhaps for a brief time to get my vested retirement benefits.

⁷ 38 U.S.C. 4311.

⁸ 38 U.S.C. 4312.

⁹ 38 U.S.C. 4323(d)(1).

¹⁰ The ugly scene that Mr. Smith created in January 2019 will go a long way toward proving that he violated the law willfully.

A: Do not say “I don’t want to go back to work there,” except when you are speaking to your own lawyer behind closed doors. Smith clearly does not want you back, and it is likely that, once he is lawyered up, he will be willing to pay a premium to be done with you.

Most cases settle, and what you need is a lawyer with strong negotiating skills.

Q: If I accept another job at another local employer, does that moot my USERRA case against Jack Smith, Inc?

A: No, quite the contrary. In USERRA cases, and in employment discrimination cases generally, the plaintiff has a *duty to mitigate damages*. As soon as Mr. Smith has rejected or ignored your application for reemployment, you should diligently seek employment elsewhere, and you should document your jobhunting efforts.

Please join or support ROA

This article is one of 1800-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. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. 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 many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, 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 seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. 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 www.roa.org or call ROA at 800-809-9448.

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:

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