

You Have the Right to Time Off from your Civilian Job To Travel to Your Drill Weekend and To Arrive in a “Fit for Duty” Condition

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[About Sam Wright](#)

1.1.1.7—USERRA applies to state and local governments

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

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***Smith v. Downers Grove*, 2020 U.S. Dist. LEXIS 53146 (N.D. Ill. March 26, 2020).**³

Carissa Smith, an enlisted member of the Army Reserve, was hired as a police officer recruit in May 2015.⁴ Like other police recruits in Downers Grove and other suburban communities, she

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 “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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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 (VRRRA—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 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, 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 This is a very recent decision of Judge Edmond E. Chang of the United States District Court for the Northern District of Illinois. In this article, I will discuss only the issue of the plaintiff's right to time off from her civilian job on the night before her drill weekend, so that she could travel to the drill site and arrive in a fit-for-duty condition.

⁴ The Village of Downers Grove is the employer and defendant. Downers Grove is in DuPage County, Illinois, in the Chicago metropolitan area.

attended the Suburban Law Enforcement Academy and completed her academy training in June 2015.

As is typical in police departments, new police officers in Downers Grove are required, after completing the police academy, to undergo a lengthy period of training and a probationary period, before becoming full-fledged patrol officers. In Smith's case, the start of her training program was delayed because the Army called her to a year of active duty, from July 2015 to July 2016. Smith served honorably while on active duty and returned to work for Downers Grove in September 2016.

In December 2016, there was a conflict between Smith's police officer schedule and her Army Reserve drill schedule. The police department scheduled her to work a shift that started at 10:30 pm Friday night and ended at 6:30 am Saturday morning. Her Army Reserve unit scheduled her to attend a drill weekend, with the other members of the unit, starting at 6 am Saturday morning in Indiana.⁵

Smith had already provided the police department a schedule of her drill weekends for the entire fiscal year, and that schedule included the weekend in question. As the time approached, Smith reminded her police department supervisors of the fact that she was scheduled to be at her Army Reserve drill in Indiana starting at 6 am on Saturday, and she asked to be relieved of the obligation to work the Friday night shift.

Smith's supervisors did not respond to her request to be relieved from the Friday night to Saturday morning shift, and they insisted that she work the entire shift as scheduled, which she did. She reported late for her drill Saturday morning and was reprimanded for her tardiness by her Army Reserve commanding officer.

In April 2017 a similar scheduling conflict occurred. Smith worked the shift that started at 10:30 pm Friday night. Her police department supervisor "graciously" allowed her to leave at 5 am Saturday morning, and she drove to the Indiana drill site and arrived on time, *but she had no rest Friday night and was not fit-for-duty Saturday morning*. Something very similar happened during her May 2017 drill weekend.

The Department of Labor (DOL) regulation under the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides:

Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

⁵ The court decision does not say where in Indiana the drills were conducted or how long it took to drive from Downers Grove to the drill site.

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.⁶

During their drill weekends, Reserve and National Guard personnel are expected to learn critical skills and knowledge that they will need when deployed. If the individual reservist like Carissa Smith has had no sleep, she will likely fail to learn and remember these things. Her lack of knowledge can easily endanger mission accomplishment and result in additional casualties.

Moreover, Reserve and National Guard personnel are frequently required to operate and maintain vehicles, aircraft, and other equipment during their drill weekends. If they engage in such activities without enough rest, the dangers to themselves and their colleagues will be magnified.

Moreover, it should be noted that Smith was not required to ask for or get her employer's permission to absent herself from work for a Friday night shift before a Saturday morning drill — she was only required to give *notice*. The DOL USERRA regulation provides:

Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.⁷

⁶ 20 C.F.R. 1002.74 (bold question in original, emphasis by italics supplied).

⁷ 20 C.F.R. 1002.87 (bold question in original).

It should also be emphasized that Smith's "probationary" status at the time of these drill weekends in no way detracts from her USERRA rights. The 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.⁸

If our nation is to defend itself without reinstating the draft, we must educate employers about USERRA and persuade them to comply and sue them when they flout this essential law. Yes, Reserve and National Guard service puts a burden on civilian employers and sometimes on the civilian colleagues of those who serve. That burden is tiny as compared to the much greater burden (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform.

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This article is one of 2000-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.

⁸ 20 C.F.R. 1002.41 (bold question in original, emphasis by italics supplied).

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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