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The Elizabeth Dole Act Improves USERRA.
By Colonel George C. Aucoin, USMC (Ret.)[2]

1.3.1.2—Character and duration of service.
1.4—USERRA enforcement.

On 1/2/2025, President Joe Biden signed into law the Senator Elizabeth Dole 21st Century Veterans Healthcare and Benefits Improvement Act (Dole Act). In addition to improving the Department of Veterans Affairs (VA) and optimizing veterans' benefits, especially in the areas of home caregiving and veteran homelessness,[3] the Dole Act modernizes and improves the Uniformed Services Employment and Reemployment Rights Act (USERRA), 30 years after that law was signed on 10/13/1994.[4]

The USERRA amendments contained in the Dole Act emerged from a predecessor bill called the "Servicemember Employment Protection Act of 2023" or H.R. 3943. That bill was introduced by Representative Scott Franklin of Florida's 18th Congressional District.

The improvements that the Dole Act made to USERRA can be subdivided into five categories:

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[1] We invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,200 "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 Spouses' 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2] Colonel Aucoin is a life member of ROA and a USERRA lawyer with 20 years of experience representing American Warriors. *See Duarte v. Agilent Technologies, Inc.,* 366 F. Supp. 2d 1036 (D. Colo. 2005). *See also* Law Review 172 (June 2005).

[3] *See* Law Review 24058 (December 2024). That article is by Bradley Hennings and Robert Chisholm of the Rhode Island law firm Chisholm Chisholm & Kirkpatrick (CC&K), the nation's largest law firm devoted exclusively to assisting veterans in obtaining their earned veteran benefits.

[4] *See* Law Review 24047 (October 2024).

a. USERRA's expressed purpose is now to "encourage service in the uniformed services" not just "noncareer" service.

USERRA's first purpose, as expressed in section 4301(a)(1),[5] was, until quite recently, "to encourage *noncareer* service in the uniformed services." The Dole Act has eliminated the word "noncareer." This is a major improvement.[6]

The inclusion of the qualifier "noncareer" gave employers the opportunity to argue that "Mary Jones does not have the right to reemployment because her service amounted to 'career' service." Because of the amendment, employers will no longer have the opportunity to make this argument.

With the protection of USERRA, it is entirely possible and often necessary for a National Guard or Reserve service member to have two careers, a full-time civilian career and a part-time military career that becomes full-time when the member is called to full-time military duty. Deleting the word "noncareer" was entirely necessary and appropriate.

b. Expand USERRA's protection against employer retaliation for exercising USERRA rights.

Until very recently, section 4311(b) of USERRA read as follows:

> 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

[5] 38 U.S.C. § 4301(a)(1) (emphasis supplied).
[6] *See* Law Review 23063 (November 2023).

> provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.[7]

The Dole Act amended section 4311(b) by adding "or other retaliatory action" after "employment action." This is a welcome addition.

In a recent case, a United States District Court Judge, hearing a motion to dismiss, held that an allegation that a supervisor had initiated a malicious criminal prosecution against an employee to reprise against the employee for having exercised his USERRA rights was not a violation of section 4311(b), even if true, because a criminal prosecution, even if malicious, was not an "adverse employment action."[8] We had this case in mind when we proposed this amendment, and we are most pleased that this amendment has been enacted.

c. Expand the availability of preliminary injunctive relief for service members whose USERRA rights have been violated.

The Dole Act expands and improves the availability of preliminary injunctive relief in situations where an employer has violated USERRA or where a violation has been threatened or appears to be imminent. Going forward, the service member or veteran will be entitled to injunctive relief if he or she meets a four-part test:

a. A violation of USERRA has occurred or has been threatened or appears to be imminent.
b. The service member or veteran has shown that he or she is likely to succeed on the merits when the case goes to trial.

[7] [7] 38 U.S.C. § 4311(b).

[8] *See Lara v. Rock Valley Community College District Police Department,* 2023 U.S. Dist. LEXIS 36689, 2023 WL 2374979 (N.D. Ill. March 6, 2023). *See also* Law Review 23032 (June 2023), and Law Review 23064 (December 2023).

c. The harm to the service member or veteran outweighs the harm to the employer.
d. Granting injunctive relief is in the public interest.

Traditionally, preliminary injunctive relief has been available in civil cases generally only if the party seeking such relief can show *irreparable injury* if the preliminary injunctive relief is denied. It is not ordinarily possible to get injunctive relief to stop an employer from firing an employee. The idea is that an unlawful firing is not irreparable because if the employee wins at trial the court can award back pay.[9]

Let us say that Joe Smith has enlisted in the Regular Army and is in the Delayed Entry Pool, expecting to enter active duty in four months. The employer learns that Smith has enlisted and fires him, angry that Smith defied the employer's "order" not to enlist. How is Smith to pay his rent and put food on the table in the four months remaining before he enters active duty? It is of little comfort to Smith that he can sue and maybe, two or three years later, after he is already on active duty, he can get a back pay award.

The Dole Act amended USERRA to provide that preliminary injunctive relief cannot be denied on the basis of the possibility that the plaintiff who has been unlawfully fired or unlawfully denied reemployment may receive back pay months or years later. This is a most welcome improvement.

d. Improve USERRA's provision for liquidated damages for willful employer violations.

Section 4323 of USERRA[10] provides for enforcement of USERRA against private employers and political subdivisions of states (counties, cities, school districts, etc.). Until very recently, section 4323 provided as

[9] *See Sampson v. Murray,* 415 U.S. 61 (1974); *Bedrossian v. Northwestern Memorial Hospital,* 409 F.3rd 640 (7th Cir. 2005). *See generally* Law Review 200 (published in 2005).
[10] 38 U.S.C. § 4323.

follows about the remedies that a federal district court can award in cases against private employers and political subdivisions:

> 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 subsection (B) [and in addition to that amount] as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.[11]

The Dole Act amends the "liquidated damages" provision to read as follows: "The court may require the employer to pay the person the greater of $50,000 or the amount equal to [loss of wages and benefits suffered by an employer's failure to comply] as liquidated damages, if the Court finds that the employer knowingly failed to comply with the provisions of this chapter."

Let us consider a hypothetical but realistic scenario. Joe Smith left his job as a cook at Quisling's Norwegian Seafood Restaurant to enlist in the Army. Smith gave the restaurant prior notice before leaving his job. He served honorably on active duty for four years, within the five-year limit, and he made a timely application for reemployment after leaving active duty. Smith met the five USERRA conditions for reemployment. Vidkun Quisling, the owner-operator of the restaurant, was well aware

[11] 38 U.S.C. § 4323(a)(1).

of his legal obligation to reemploy Smith, but Quisling willfully refused to do so because of his animus against members of the United States military.

Smith quickly found a new job at another restaurant in the same city, and the back pay award was quite modest, just $500. Until quite recently, Quisling would have lucked out because of Smith's diligence and good fortune in quickly finding alternative employment. Under the Dole Act amendment, Quisling will have to pay $50,000 for willfully violating the federal reemployment statute. This amendment will deter employers from willful USERRA violations.

e. Improve the USERRA provisions for shifting the service member's attorney fees onto the lawbreaking employer.

Under the 1940 reemployment statute that was in effect before Congress enacted USERRA on 10/13/1994, it was possible for an individual to sue a private employer in federal court, in his or her own name and with his or her own attorney, but the 1940 law made no provision for requiring the lawbreaking employer to compensate the service member or veteran for the attorney fees that he or she incurred in the successful lawsuit against the employer.

USERRA provides for the court or the Merit Systems Protection Board (for USERRA cases against federal executive agencies) to pay the attorney fees in this situation, but there have been loopholes and deficiencies in the attorney fee provisions. The Dole Act makes two important and welcome changes regarding attorney fees. Those changes are described in detail in Law Review 23066 (December 2023) and Law Review 24006 (January 2024).

Summary

In summary, the Senator Elizabeth Dole 21st Century Veterans Healthcare and Benefits Improvement Act provides a significant improvement to the Uniformed Services Employment and Reemployment Rights Act (USERRA) some 30 years after USERRA was signed into law. Great progress has been made, but more remains to be done. The Reserve Organization of America (ROA) will continue its noble mission to inform service members of their legal rights under USERRA and other laws and to ensure that these laws are liberally construed and strictly enforced.

Kudos to those who made it happen

ROA thanks and congratulates Representative Scott Franklin of Florida's 18th Congressional District. In 2023, Representative Franklin introduced H.R. 3943, the proposed "Servicemember Employment Protection Act of 2023." That bill was approved by the House Committee on Veterans' Affairs and later incorporated into the Dole Act. Scott Franklin graduated from the United States Naval Academy in 1986 and then served for 26 years in the Navy and Navy Reserve as a Naval Aviator.

Others who deserve credit include Matt Schwartzman,[12] Samuel F. Wright,[13] Brian Lawler,[14] and Kathryn Piscitelli.[15]

[12] Matt Schwartzman is the Director, Legislation and Military Policy, on the ROA staff.
[13] Samuel F. Wright is a life member of ROA. He served in the Navy and Navy Reserve as a judge advocate and retired as a Captain. As an attorney for the United States Department of Labor, he was one of two principal drafters of USERRA. He is the author of most of ROA's "Law Review" articles, including seven articles about H.R. 3943 when it was introduced.
[14] Brian Lawler is a life member of ROA. He served in the Marine Corps and Marine Corps Reserve as a Naval Flight Officer and retired as a Lieutenant Colonel. He is an attorney in San Diego with a nationwide USERRA practice. He has had some great USERRA victories, including in the United States Supreme Court.
[15] Kathryn Piscitelli is one of two authors of *The USERRA Manual,* the definitive reference on USERRA. *See* Law Review 16044 (May 2016).

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This article is one of 2,200-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. We add new articles each month.

ROA is the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve 32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[16]

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and

[16] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight[17] uniformed services, you are eligible for membership in ROA,[18] and a one-year membership only costs $20 or $450 for a life membership. 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 https://www.roa.org/page/memberoptions 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:

Reserve Organization of America
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Washington, DC 20002[19]

[17] Congress recently established the United States Space Force as the eighth uniformed service.
[18] Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.
[19] You can also contribute on-line at www.roa.org.