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You Are Entitled to Reemployment even though your Employer Abolished your Position during the Time you Were on Active Duty.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.3.2.1—Prompt reinstatement in civilian job.
1.3.2.2—Continuous accumulation of seniority-escalator principle.

Q: I am a Major in the Army Reserve and a life member of the Reserve Organization of America (ROA). I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have informed many of my Army Reserve colleagues about your excellent articles. I became a member and later upgraded to life member status

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[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 45 years, I have collaborated 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 38 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 mailto:swright@roa.org.

because I want to support what you are doing for Reserve Component service members.

In 2016, I was hired by a large company—let us call it Daddy Warbucks Industries or DWI. At a large DWI facility in my hometown, I performed a specific necessary function. It was a function that needed to be done every working day, but it was a function that I alone could and did accomplish. I trained another DWI employee to perform that function on working days when I was absent for whatever reason.

I have been away from my DWI job many times for voluntary and involuntary military training and service. Except for the most recent period, from 10/1/2021 until 9/30/2024, all of my military service periods have been exempt from the USERRA five-year limit under section 4312(c).[3] I have read and reread your Law Review 16043 (May 2016), and I am confident that all of my military service periods, except for the most recent period, are exempt from the five-year limit under the various subsections of section 4312(c).

In 2021, I volunteered to perform a three-year Active Guard & Reserve (AGR) tour in the Army Reserve. This period began on 10/1/2021 and ended exactly three years later, on 9/30/2024.

I have read and reread your Law Review 15116 (December 2015). I have met and have documented that I have met the five conditions for reemployment under USERRA. I left my DWI job to perform uniformed service, and I gave DWI oral and written notice in August 2021. I have not exceeded the cumulative five-year limit on the duration of my periods of uniformed service related to my employment relationship with DWI. The 2021-24 period counts, but all my other periods of uniformed service are exempt. I served honorably, and I did not receive one of the disqualifying bad

[3] 38 U.S.C. § 4312(c).

discharges enumerated in section 4304 of USERRA.[4] Indeed, I was not discharged at all. On 9/30/2024, I was released from active duty and returned to the status of a part-time Army Reserve soldier. On 10/2/2024, I made a formal written application for reemployment at DWI, well within the 90-day deadline for doing so.[5]

Although I clearly met the five conditions for reemployment, the DWI General Counsel (GC) insists that I am not entitled to reemployment because the company "abolished my position" in October 2021, a few days after I left to report to active duty.

Instead of hiring a new employee to perform the necessary function that I had been performing or reassigning another employee to perform that function, DWI chose to contract out the function to a company called Staff-R-Us (SRU). DWI signed a five-year contract with SRU, and SRU provides employees to perform several functions at the DWI facility, including the function that I had been performing. That five-year contract does not expire until October 2026.

Obviously, the DWI GC is an attorney. How am I to argue with an attorney about legal requirements? Do you think that I am entitled to reemployment even though the company abolished my position during the time that I was away from work on active duty?

Answer, bottom line up front:

The company's decision to abolish the position of employment is of no consequence because that decision was made *because you were away from your job performing uniformed service.* This is not a change that would have been made anyway even if you had not been away from work for service.

[4] 38 U.S.C. § 4304.
[5] 38 U.S.C. § 4312(e)(1)(D).

Explanation

Because you met the five conditions, DWI was required to reemploy you "in the position of employment in which the person [you] *would have been employed if the continuous employment of such person had not been interrupted by such service,* or a position of like seniority, status, and pay, the duties of which the person is qualified to perform."[6] The evidence is clear that if your DWI employment had not been interrupted by this three-year AGR tour you would still be employed by DWI in the position that you held in September 2021, just before the AGR tour started. *This was not a change that would have happened anyway.*

Q: The DWI GC insists that the company cannot afford to comply with its contract with SRU and also reemploy me to perform the same function. Does USERRA override the DWI contract with SRU?

A: If hiring another employee to fill the vacancy of an employee who departs from the position for military service defeated the individual's right to return to the job after service, USERRA would be of little value. Many old and recent cases hold that the returning veteran who meets the eligibility criteria is entitled to reemployment **even if that means that another employee must be displaced.**

The United States Court of Appeals for the Federal Circuit[7] has held:

> The department [United States Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols' [Nichols was the returning veteran and plaintiff] former

[6] 38 U.S.C. § 4313(a)(2)(A).

[7] The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board.

> position was "unavailable" because it was occupied by another and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if it is occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[8]

The pertinent section in the Department of Labor (DOL) USERRA regulation is as follows:

> Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. *The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position*

[8] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993). For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite the reader's attention to *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992); *Goggin v. Lincoln-St. Louis,* 702 F.2d 698, 704 (8th Cir. 1983); *Davis v. Crothall Services Group,* 961 F. Supp. 2d 716, 730-31 (W.D. Pa. 2013); *Serricchio v. Wachovia Securities LLC,* 556 F. Supp. 2d 99, 107 (D. Conn. 2008); *Murphree v. Communication Technologies, Inc.,* 460 F. Supp. 2d 702, 710 (E.D. La. 2006); *Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 10 (E.D. Mich. 1985); *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981); *Hembree v. Georgia Power Co.,* 104 L.R.R.M. (BNA) 2535 (N.D. Ga. 1979), affirmed in part, reversed in part on other grounds, 637 F.2d 423 (5th Cir. 1981); *Jennings v. Illinois Office of Education,* 97 L.R.R.M. (BNA) 3027 (S.D. Ill. 1978, judgment affirmed, 589 F.2d 935 (7th Cir. 1979); and *Muscianese v. U.S. Steel Corp.,* 354 F. Supp. 1394, 1402 (E.D. Pa. 1973).

during the employee's absence, even if reemployment might require the termination of that replacement employee.[9]

If filling the position with another employee does not defeat the veteran's right to reemployment, it is reasonable to argue that filling the function by contracting it out to another company also does not defeat the veteran's right to reemployment.

There are several ways that DWI can comply with USERRA in this scenario. The company could reemploy you in another position that is of like seniority, status, and pay and for which you are qualified, or the company could offer to train you for that other position to make you qualified. The company can offer you enough money to persuade you to waive your right to reemployment and find employment elsewhere.

Q: The GC of DWI insists that reemploying me under these circumstances would be an "undue hardship" on the company and that Congress could not have intended to impose such a burden on a company like DWI. What do you say about that?

A: USERRA's "undue hardship" affirmative defense only applies "in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313."[10] Section 4313(a)(3) and section 4313(b)(2)(B) apply to the returning veteran with a disability incurred or aggravated during the period of service who needs an employer accommodation for that disability. Section 4313(a)(4) applies to a returning veteran who needs employer accommodation for some other reason.

[9] 20 C.F.R. § 1002.139(a) (emphasis supplied).
[10] 38 U.S.C. § 4312(d)(1)(B).

You have not asked for and do not need any special accommodation from DWI. The "undue hardship" affirmative defense does not apply to your situation.

It has now been two generations since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973. Those who are considering enlistment today have never faced the prospect of being drafted, and neither have their parents. No one has been drafted by our country since the grandparents or great-grandparents of today's service members were of military age.

Relying exclusively on volunteers, our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that it is never necessary for our country to reinstate the draft.

Defending our country in a dangerous world, without relying on compulsion to fill the ranks, means that our nation must maximize the incentives and minimize the disincentives to military service in the Active Component, the Reserve, and the National Guard.

Most of the 2,200 articles in our "Law Review" series[11] address laws that seek to minimize the disincentives to service. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the concerns of the service member or potential service member that he or she will lose out on civilian job opportunities because of service to our country in uniform. The Servicemembers Civil Relief Act (SCRA) addresses the concerns of the service member that he

[11] Please see footnote 1.

or she will lose the opportunity to be heard in a civil or administrative proceeding back home because he or she is serving in uniform hundreds or thousands of miles away or that he or she will have to continue paying rent for an apartment that is no longer needed because he or she has enlisted or has been called to active duty.

I invite the reader's attention to Law Review 14080 (July 2014), by Nathan Richardson[12] and myself. In that article we wrote:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country in the armed forces. In the All-Volunteer Military recruiting is a constant challenge. Despite our country's current [2014] economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
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> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicines for conditions like attention deficit hyperactivity disorder), felony convictions,

[12] At the time (summer 2014), Nathan Richardson was an unpaid summer intern at the Service Members Law Center, of which I was the Director. Nathan is now a lawyer in New York City.

> cosmetic issues, or educational deficiencies (no high school diploma).
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> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There definitely is a compelling interest in the enforcement of USERRA.

As Nathan Richardson and I predicted in 2014, the services (and especially the Army) have suffered from recruiting shortfalls and this year is the most challenging year for military recruiting since the draft was abolished in 1973.

While I am very glad that Congress abolished the draft 52 years ago, I also think that conscription is constitutional, justified, and necessary when our nation is unable to recruit enough volunteers. In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

> It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with

> a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.[13]

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20th Century) and by drafting young men into military service.[14] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[15]

Today, no one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

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[13] Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.
[14] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).
[15] *Arver v. United States,* 245 U.S. 366 (1918).

As we approach the 24th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel, Active Component (AC) and Reserve Component (RC), have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, 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,

> unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 24 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, almost 52 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor.

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren.

You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

Please join or support ROA.

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 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.

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

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
1 Constitution Ave. NE
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.