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DOL-VETS and DOJ Secure Great Results in USERRA Lawsuits against Walmart and the Oklahoma City Public School System.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.4—USERRA enforcement.

Hunger v. Walmart[3]

In May 2016, Navy Reserve Third Class Petty Officer (E-4) Lindsey Hunger applied for a job at a Walmart store near her home and was told that she would be hired. During an initial interview with a Walmart supervisor, she mentioned that she was a member of the Navy Reserve

[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.

[3] *See* Law Review 19101 (November 2019).

and that she was required to attend a two-week annual training session that summer. The supervisor told her that Walmart would not permit her to be away from work for two weeks and that the job offer was rescinded.

Hunger was unemployed because Walmart rescinded the job offer, and she was receiving unemployment compensation from her state. As a condition of receiving unemployment compensation, she was required to keep the state employment commission informed of her efforts to find a job. She informed the commission about what had happened at Walmart, and a commission employee contacted the company to confirm what she had said. A Walmart supervisor confirmed that Hunger had been denied initial hiring because of her Navy Reserve training obligations.

In July 2016, Hunger filed a formal written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), asserting that Walmart's decision not to hire her violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). The pertinent USERRA section is as follows:

> **(a)** 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.
>
> **(b)** 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 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.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

> **(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[4]

Under section 4311(c)(1), above, Hunger was not required to prove that the employer's decision not to hire her was motivated *solely* by her Navy Reserve affiliation and her obligation to perform two weeks of annual training that summer (2016). She was only required to prove that her military obligations were *a motivating factor* in the employer's decision, but this time it seems clear that her military obligations were the sole reason for rescinding the job offer. Walmart found her well qualified until she informed the employer that she was a reservist and would need to be away from work for military training that summer.

DOL-VETS investigated Hunger's USERRA complaint and found it to have merit and reported its finding to Hunger in October 2016. At her request, DOL-VETS transmitted the case file to the Department of Justice (DOJ) in December 2016. Finally, in late October 2019, DOJ sued Walmart in federal court. I am pleased that DOJ filed this lawsuit, *but why did it take almost three years to file a suit in such a clearly meritorious case?*

Finally, in February 2025, this case was resolved favorably.[5] It took almost nine years for Petty Officer Hunger to receive justice in a clearly meritorious case. Going forward, we must do much better in getting cases resolved promptly.

[4] 38 U.S.C. 4311 (emphasis supplied).

[5] At the end of this article, I have placed a link to the DOJ press release dated 2/5/2025.

Petty Officer Hunger received substantial back pay and Walmart agreed to reiterate its policy that all store managers must comply with USERRA, and Walmart agreed to retrain the managers at the particular store where this discrimination occurred.

McCullough v. Oklahoma City Public Schools[6]

On 5/29/2024, the United States Department of Justice (DOJ) sued the Oklahoma City Public Schools (OCPS) on behalf of Senior Airman (E-4) Michael J. McCullough, USAFR. DOJ contended that OCPS, the public school system for most of the Oklahoma City metropolitan area, violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it refused to reinstate McCullough to his teaching job when he returned from a period of military service (February through December 2022) and met the USERRA conditions for reemployment. I commend DOJ and the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) for their excellent work in this case, and I endorse their legal theory.

USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal statute that was enacted in 1994 as an update of and replacement for the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940. USERRA gives a person the right to reemployment after a period of voluntary or involuntary uniformed service, and USERRA also protects individuals from employment discrimination in hiring, retention, promotions, and benefits of employment on the basis of their membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service.

[6] *See* Law Review 24036 (July 2024).

USERRA applies to almost all employers in the United States, including the Federal Government, the States, the political subdivisions of States (like OCPS), and private employers, regardless of size.

A person who leaves a civilian position of employment for uniformed service is entitled to reemployment upon release from the period of service if he or she meets five simple conditions. As I have explained in Law Review 15116 (December 2015) and many other articles, the returning service member or veteran must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a civilian job (federal, state, local, or private sector) to perform "service in the uniformed services" as defined by USERRA.[7]
b. Must have given the employer prior oral or written notice.[8]
c. His or her cumulative period or periods of uniformed service, related to the employer relationship for which he or he seeks reemployment, must not have exceeded five years.[9]
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.[10]
e. After release from the period of service, must have made a timely application for reemployment with the pre-service employer.[11]

It is clear beyond doubt that McCullough met these five conditions and OCPS had the legal obligation to reemploy him promptly in the position

[7] 38 U.S.C. § 4312(a).
[8] 38 U.S.C. § 4312(a)(1).
[9] 38 U.S.C. § 4312(c). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit.
[10] 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offences) and OTH ("other than honorable") administrative discharges.
[11] After a period of service that lasted more than 180 days, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

of employment that he would have attained if he had remained continuously employed by OCPS (possibly a better job than the one he left) and to treat him, for seniority and pension purposes, as if he had remained continuously employed in his civilian job during the entire time that he was away from work for service in the uniformed services.

Facts

Michael J. McCullough was hired by OCPS and began his job on 1/3/2022, teaching music at Fillmore Elementary School.[12] Just 39 days later, on 2/11/2022, McCullough unexpectedly received written Air Force orders directing him to report to active duty just three days later, on 2/14/2022. He immediately gave notice to the principal of Fillmore Elementary, and he reported to active duty as ordered.

On 3/10/2022, OCPS Human Relations (HR) sent McCullough a letter, telling him that his contract would not be renewed after the end of the 2021-22 school year. McCullough expected that his Air Force orders would end in July 2022, and he responded to the HR letter in April 2022, informing the school district of his intent to return to work at the start of the 2022-23 school year and asking the district to identify the school where he would be working. OCPS did not respond to his e-mail.

In July, the Air Force notified McCullough that his orders had been extended until 12/30/2022. McCullough notified OCPS of the extension and expressed the intent to return to work immediately after the Christmas break. McCullough sought reemployment immediately after he left active duty, but the school district refused to reemploy him.

[12] McCullough was originally hired by OCPS in August 2020 and worked as a band teacher at Capitol Hill Middle School. His employment was interrupted by required military training after he enlisted in the USAFR in June 2020, and the school district unlawfully refused to offer him employment for the 2021-22 school year. He was rehired on 1/3/2022 as a new hire with no seniority.

McCullough complained to DOL-VETS that OCPS had violated his USERRA rights.

On 12/13/2022, McCullough filed a formal complaint, in writing, with DOL-VETS, in accordance with section 4322 of USERRA.[13] In accordance with section 4322(d),[14] DOL-VETS investigated McCullough's complaint and found that it had merit. On 6/12/2023, DOL-VETS advised the school district that it had violated USERRA when it refused to reinstate McCullough to his teaching job. DOL-VETS then tried to persuade OCPS to come into compliance with the federal law, but the school district refused to do so.

In accordance with section 4323(a)(1),[15] McCullough asked DOL-VETS to refer the case file to DOJ, and DOL-VETS complied with that request. In accordance with section 4323(a)(1)[16] DOJ reviewed the case file and determined that it was reasonably satisfied that McCullough was entitled to the USERRA benefits that he sought and filed suit against OCPS on 5/29/2024.

On 2/7/2025, DOJ announced that this case had been favorably resolved. Senior Airman McCullough received substantial back pay, and OCPS agreed to comply with USERRA going forward, for McCullough and all other employees and applicants for employment. I have placed a link to the DOJ press release at the end of this article.

We, the Reserve Organization of America, are very pleased that this case was resolved much more quickly than the case against Walmart.

[13] 38 U.S.C. § 4322.
[14] 38 U.S.C. § 4322(d).
[15] 38 U.S.C. § 4323(a)(1).
[16] Id.

Please join or support ROA.

This article is one of 2,300-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).[17]

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 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

[17] *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[18] uniformed services, you are eligible for membership in ROA,[19] 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[20]

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

Here is a link to the DOJ press release announcing the favorable resolution of the USERRA case against Walmart, on behalf of Petty Officer Lindsey Hunger, USNR:

https://www.justice.gov/archives/opa/pr/justice-department-announces-settlement-walmart-over-discrimination-claim-naval-reservist

Here is a link to the DOJ press release announcing the favorable resolution of the USERRA case against the Oklahoma City Public School System:

https://www.justice.gov/opa/pr/justice-department-secures-agreement-oklahoma-city-public-schools-resolve-alleged