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Section 4316(c) of USERRA:
Special Protection against Discharge after Reemployment.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.2—USERRA forbids discrimination
1.3.2.12—Special protection against discharge, except for cause
1.8—Relationship between USERRA and other laws/policies

This article is a republication of Law Review 18053 (June 2018), with a few updates. We are republishing the article because eight years have gone by and because I have recently received inquiries about section 4316(c) of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Here is the entire text of section 4316(c):

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,300 "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.

[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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 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.

> **(c)** A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause--
> **(1)** within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
> **(2)** within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.[3]

Q: I am a Sergeant Major (E-9) in the Army Reserve and a life member of the Reserve Organization of America (ROA).[4] On the civilian side, I work for an intermediate size local company—let's call it Coors Heineken & Schlitz Incorporated or CHSI. Mr. Coors, the principal owner-operator of the company, has for years criticized me for my Army Reserve service and my absence from work necessitated by that service. Accordingly, I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Almost a year ago, I left my CHSI job for a year of voluntary active duty, and I will leave active duty soon. I have read and reread your Law Review 24047 (October 2024). I am being very careful to meet the five USERRA conditions for reemployment and to document that I meet them. I left my CHSI job to perform this current active duty period, and I gave Mr. Coors prior oral and written notice. I am well within the cumulative five-year limit on the duration of my periods of

[3] 38 U.S.C. § 4316(c). This refers to section 4316(c) of title 38 of the United States Code.
[4] In 2013, ROA members amended the ROA Constitution to make noncommissioned officers eligible for full membership in the organization, including voting and running for office. We later adopted the "doing business as" name of "Reserve Organization of America" to emphasize that we represent and seek to recruit enlisted service members as well as officers.

uniformed service relating to my employer relationship with CHSI. I have served honorably, and I will not receive a disqualifying bad discharge from the Army. I know that I have 90 days to apply for reemployment, after the date of my release from active duty,[5] but I plan to apply for reemployment on the day after my release date.

Mr. Coors has continually made it clear that he does not like my Army Reserve service and has threatened to fire me for being away from work for service. A year ago, when I gave him notice of this current active duty period, he reacted very negatively and refused to assure me that my civilian job would be here for me upon my return from active duty. My concern is that Mr. Coors will reinstate me to my job and then, a few days or weeks later, try to find a pretext to fire me. What protection does USERRA give me from bad faith or pro forma reinstatement?

A: You are protected by section 4316(c) of USERRA. I have reprinted that subsection at the top of this article.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue rewrite and update of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. From the beginning, the federal reemployment statute has had a "special protection against discharge" provision, because Congress has always recognized that employers will be tempted to make a mockery of the reemployment obligation by reinstating the returning veteran only to fire him or her shortly thereafter. USERRA made a small change in the calculation of the duration of the special protection period but did not change the

[5] 38 U.S.C. § 4312(e)(1)(D).

underlying concept. USERRA's legislative history provides as follows concerning section 4316(c):

> Section 4315(d) [later renumbered as 4316(c)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. Under current law [the VRRA] there is a one-year period of special protection against discharge without cause after return from active duty and six months protection after return from initial active duty for training. There is no explicit protection [under the VRRA] for employees returning from active duty for training or inactive duty training regardless of length. Under this provision, the protection [period] would begin only upon proper and complete reinstatement. *See O'Mara v. Peterson Sand & Gravel Co.,* 498 F.2d 896, 898 (7th Cir. 1974).
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> The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement. As expressed in *Carter v. United States,* 407 F.2d 1238, 1244 (D.C. Cir. 1968, "cause" must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice, expressed or fairly implied, that such conduct would be cause for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario,* 796 F. Supp. 166, 172 (E.D. Pa. 1992).
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> The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v.*

> *Louisville & Nashville Railroad Co.,* 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the "escalator" principle would have eliminated a person's job or placed that person on layoff in the normal course.[6]

As I have explained in Law Review 17068 (June 2017), *The USERRA Manual* by Kathryn Piscitelli and Edward Still is the definitive reference on USERRA. In their book, they devote nine pages to section 4316(c).[7]

Q: Mr. Coors, the principal owner-operator of CHSI, has said many times that we are in an "at-will" state and that I am an "at-will" employee, meaning that he can fire me for any reason or no reason. What do you say about that?

A: In their book, Ms. Piscitelli and Mr. Still write:

> Section 4316(c) of USERRA protects from discharge without just cause employees who are reemployed after returning from a period of military service lasting more than 30 days. In so doing, the statute [USERRA] converts the otherwise at-will employment status of the employee during the discharge-protected period.[8]

In our country, the great majority of private sector employees are "at-will" employees. You are an at-will employee unless you have a collective bargaining agreement (negotiated by your union and the

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[6] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (part 1), reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The three quoted paragraphs can be found on pages 731-32 of the 2025 edition of the *Manual.* The 2026 edition will be published soon.

[7] *The USERRA Manual,* 2025 edition, section 6:6, pages 260-268.

[8] Id., at page 260.

employer) that limits firings to just cause. Today, unions represent only a tiny percentage of the private sector workforce.

If you are an at-will employee, you can be fired for any reason or no reason *but not a reason that a specific federal or state statute proscribes as a basis for making employment decisions.* A century ago, the at-will doctrine was much more meaningful than it is today, because many federal and later state laws have been enacted in the last century that forbid discrimination on the basis of certain characteristics or activities. The federal reemployment statute (originally enacted in 1940) is one of those statutes. A statute that did not apply to at-will employees would be an essentially worthless statute.

Q: What happens if Mr. Coors reinstates me to my job and then waits a year and a day before firing me?

A: In that case, section 4311 of USERRA comes into play. The section reads as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
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> **(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 or other retaliatory 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.[9]

Please see Law Review 17016 (March 2017). In that article, Thomas Jarrard and I discuss section 4311 in greater detail.

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Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman, who, as President, signed ROA's congressional charter in 1950. That charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the

[9] 38 U.S.C. § 4311 (emphasis supplied).

case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.

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