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USERRA Gives you the Right To Be Absent from Work When your Absence Is "Necessitated by Reason of Service in the Uniformed Services"

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About Sam Wright

1.1.1.7—USERRA applies to state and local governments
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Q: I am a Major in the Army National Guard and a member of the Reserve Organization of America (ROA).[3] On the civilian side, I am a police officer for the city where I live. I have read

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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. I am the author of more than 1700 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 (VRRA—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 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.

[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name:

with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The National Guard armory where I perform my weekend drills is 200 miles away from the city where I live and work. The drills are usually conducted on the first weekend of every month.

Recently, I completed my civilian job shift at 5 pm and drove 200 miles to the armory and spent Friday night at a nearby motel, as I often do for my drill weekends. I woke up early Saturday morning and drove to the armory, only to learn that the armory was affected by a black-out in the local area. Because the power company indicated that restoring power would likely take all weekend, our drill weekend was canceled.

I was scheduled to work at my police officer job on that Saturday morning, but I had requested military leave, and the department had already found another police officer to work that Saturday shift, which ran from 8 am to 4 pm. I left the armory location as soon as it became clear that the drill weekend was canceled, and I drove home. By the time I arrived at my home, the Saturday shift was already almost over. I reported back to my police officer job at my next regularly scheduled shift at 8 am Monday.

Each month, after my drill weekend, the police chief contacts our state's Adjutant General (head of the National Guard) to "verify" that I performed military duty on the day or days that I took military leave. A clerk in the Adjutant General's office informed the police chief that I did not perform military duty on the Saturday in question. The clerk did not know about the power failure and the canceled drill weekend. He only had information about the names and social security numbers of the personnel who performed duty on the day in question.

Now, the police chief is trying to fire me for "fraud." He said that I had no right to take military leave on that Saturday because I did not, in fact, perform military duty on that day. Help!

Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

A: As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.
b. You must have given the employer prior oral or written notice that you would be leaving the job to perform service.
c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.[4]
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.[5]
e. After release from the period of service, you must have reported back to work in a timely manner or made a timely application for reemployment.[6]

You need to meet all five conditions for each period of uniformed service that necessitated your absence from your civilian job. You are entitled to reemployment because you met all five conditions when you reported to work at 8 am on Monday.

Let us focus on the first condition, because that is the one that is relevant to your case. USERRA provides that "any person whose *absence from a position of employment is necessitated by reason of service in the uniformed services* shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if" he or she meets the five USERRA conditions.[7]

In your case, your service in the Army National Guard *necessitated* your absence from work on the Saturday in question, although as it turned out you did not perform uniformed service on that day. You were directed to report to the armory at 7 am on that day, and you reported as directed. You had no way of anticipating that a power failure would cause the drill weekend to be canceled.

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[4] Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. There are nine exemptions to the limit—that is, there are nine kinds of service that do not count toward exhausting your limit. The period of regular active duty that you are about to start will likely not be exempt, but the expected duration (four years) is well within the five-year limit.

[5] 38 U.S.C. 4304.

[6] After a period of service of 181 days or more, you have 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). After a period of service of 31-180 days, you have 14 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(C). After a continuous period of service of fewer than 31 days, you must report for work at the start of the first regularly-scheduled work period on the first day after your release from the period of service and the time reasonably required for safe transportation from the place of service to your residence plus eight hours (for rest) after your arrival at home. *See* 38 U.S.C. 4312(e)(1)(A). When you reported for work at 8 am Monday, you met this condition.

[7] 38 U.S.C. 4312(a) (emphasis supplied).

I have found one court case involving a scenario comparable to your scenario.[8] Matthew B. Ashman was an enlisted member of the Illinois Army National Guard. On the civilian side, he was a corrections officer for the Winnebago County Sheriff. On 6/30/2008, he received National Guard orders directing him to report for duty at 8 am each day starting on 6/30 and ending on 7/11. On 7/3/2008, Ashman's unit commander informed him and the other unit members that they had been granted "leave" for the Independence Day holiday on 7/4, 7/5, 7/6, and 7/7. The commander also informed him that he must remain in the area where the military duty was being performed because they might be called back to duty if certain equipment arrived and required unloading.

As it turned out, Ashman and the other unit members were not called back to duty during the "leave" period of 7/4 through 7/7. He returned to the National Guard unit for duty the morning of 7/8. He completed the duty satisfactorily and was released at the end of the day on 7/11/2008. He reported back to the civilian job as scheduled on 7/12.

On 7/9/2008, in an effort to save money, by avoiding the need to pay Ashman and the other unit members for the "leave" days of 7/4 through 7/7 inclusive, the Adjutant General's office in Springfield retroactively canceled Ashman's orders and the orders for other unit members for the "leave" days. According to the "military record," Ashman was not on duty on 7/7/2008, so the Sheriff fired him for his absence from work on that day. Judge Frederick J. Kapala correctly found the firing to be unlawful. Ashman reasonably believed that he was on military duty on 7/7 and his orders for that day were not canceled until after the fact.

While Ashman's facts are not exactly like yours, they are close enough so that we can say that the *Ashman* case is a precedent for the proposition that firing you or otherwise disciplining you for your absence from work on the Saturday in question would be unlawful.

Please join or support ROA

This article is one of 1900-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

[8] *Ashman v. Winnebago County Sheriff's Department,* 2015 U.S. Dist. LEXIS 18368 (N.D. Ill. Feb. 3, 2015). I discuss this case in detail in Law Review 15036 (April 2015).

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.

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:

Reserve Officers Association
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