Reserve Organization of America

LAW REVIEW[1] 26080
November 2026
Computing Damages in a USERRA Case.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.4—USERRA enforcement.

In 1997, the Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated the "Law Review" column in *The Officer,* ROA's monthly magazine. In 2000, we added the "Law Review" articles to our website, www.roa.org. Starting in September 2001, when 19 terrorists killed almost 3,000 Americans in the terrible Tuesday morning, ROA started adding new articles each month. We now have more than 2,300 articles on our website, along

[1] I invite the reader's attention to Law Center | ROA. 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 Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), 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. 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. As of 5/1/2026, I have come out of retirement and have affiliated with Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

with a detailed subject index, to facilitate finding articles about specific topics.[3]

In December 2005, we published Law Review 206. Because this is an important topic, and because 21 years have passed since we published the article, we are republishing the article now.

LAW REVIEW 206
December 2005
Computation of Damages in USERRA Case
By CAPT Samuel F. Wright, JAGC, USNR*

Q: I was employed by the XYZ Corp. from December 1999 until December 2002, when I was called to active duty. I returned from active duty in December 2003 and immediately applied for re-employment at XYZ. The company had filled my position, and the company was very pleased with the replacement. XYZ denied my application for reemployment, stating that there was no position available for which I was qualified. Does the lack of a current vacancy mean that I am not entitled to reemployment?

A: No. The United States Court of Appeals for the Federal Circuit has held:

> The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was

[3] I am the author of more than 80% of the published "Law Review" articles, but I am 75 and will not be around forever to author and update these articles. We are always looking for "other than Sam" articles by other lawyers.

> 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 occupied by another.
>
> A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 704 (8th Cir. 1983). 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.

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 re-employ the returning veteran, I invite the reader's attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981). There are circumstances in which the employer must lay off the replacement in order to reemploy the returning veteran. I think that your situation is such a case.

Q: In 2002, before I was mobilized, I earned $4,000 per month from XYZ, for a total of $48,000 in 2002. In 2004, after I returned from service and was denied reemployment, I diligently searched for employment for three months (January March). I finally found a job at the JKL Corporation on April 1, 2004, and that job paid $3,000 per month, plus overtime. I stayed in that job until October 1, 2004, when I got a big promotion at JKL and started earning $6,000 per month. After I was denied reemployment in December 2003, I complained to the National Committee for Employer Support of the Guard and Reserve (ESGR), and an ESGR volunteer contacted the employer (XYZ) on my behalf, explaining the company's obligations under the Uniformed Services Employment and Reemployment Rights Act (USERRA), but the company's personnel director told the ESGR volunteer to "pound sand."

I then complained to the Veterans' Employment and Training Service, U.S. Department of Labor (DOL-VETS), but the personnel director told DOL-VETS to "pound sand" as well. DOL-VETS forwarded the case to the Department of Justice (DOJ), and DOJ filed suit on my behalf against the employer, in the United States District Court.

As part of the discovery process in the court case, the employer demanded and obtained my 2004 tax return, which showed that I earned a total of $50,000 in that year. That includes: (a) regular salary and overtime pay at JKL, between April and December; (b) unemployment compensation that I received in the first three months of 2004; and (c) my Army Reserve drill pay, for one weekend of drills per month. The employer's attorney has filed a motion to dismiss the case, insisting that the "no harm, no foul" rule applies because I earned more money in 2004 ($50,000) than I earned from XYZ in 2002.

The company also offered me $5,000 in "full and final satisfaction" of my claim. Should I accept the offer? Is that figure satisfactory?

A: The court should deny the employer's motion to dismiss, and the settlement offer is grossly insufficient. The employer's computation of "no harm no foul" is faulty in several ways.

First, the comparison should be to what you would have earned from XYZ in 2004 if you had not been mobilized in 2002. The comparison should not be to what you earned from XYZ in 2002. You almost certainly would have received cost-of-living pay increases from XYZ on Jan. 1, 2003, and Jan. 1, 2004, if you had not been mobilized, and you might have received other pay raises as well. If it is reasonably certain (not necessarily absolutely certain) that you would have received such pay raises, those increases should be factored into the computation of the XYZ pay that you lost because of the company's USERRA violation. Please see Law Reviews 120 and 169. Go to www.roa.org. Click on "Legislative Affairs" then "ROA Law Reviews."

Second, the unemployment compensation that you received should not be included in the computation of mitigation of your back pay, because it came from a collateral source (the state). *See Niemann v. Alpine-Brook-Triangle Corp.,* 69 Labor Cases Par. 12,940 at page 24,995 (S.D.N.Y. 1972). *See also National Labor Relations Board v. Gullett Gin Co.,* 340 U.S. 361, 364-65 (1951) (Unemployment compensation should not be deducted from a back pay award under the National Labor Relations Act.)

If you receive, by settlement or judgment, backpay for the first three months of 2004, it is possible that the state will demand that you reimburse the state for the unemployment compensation that you received for that period of time. The state's theory would be that, in retrospect, you were not unemployed during January–March 2004 because you later received backpay for that period of time. This is why it is important that the unemployment compensation that you received must not be included as mitigation in the backpay computation.

Third, backpay should be computed on a pay period by pay period basis. If you receive, during a particular pay period, more money from the mitigating employment than you would have received from the lawbreaking employer, but for the violation, you do not receive back pay for that pay period. But the excess should not be applied to earlier or later pay periods. *See Dyer v. Hinky-Dinky, Inc*., 710 F.2d 1348 (8th Cir. 1983).

It appears that the big promotion that you received on October 1, 2004, cuts off your backpay as of that date. After that date you have been making more money from JKL than you would have received from XYZ but for the violation. But the excess should not be applied to earlier pay periods in 2004. Looking solely at your total earnings for 2004 leads to this critical computation error.

For the first three months of 2004, you did not mitigate any of your lost pay, because you had not yet found a job. Let us assume, for purposes of the computation, that your XYZ pay in early 2004 would have been $4,300 per month if you had not been mobilized in 2002. Your backpay for those months would be $12,900 ($4,300 multiplied by three).

For the next six months (April–September 2004), you were receiving $3,000 per month, and you should have been receiving $4,300 per month from XYZ. The difference is $1,300 per month, or $7,800 for that six-month period. So, the back pay for the period of January–September 2004 is $20,700.

Fourth, the overtime pay that you received from JKL during the April–September time-frame should not be deducted from your back pay award, because that would amount to rewarding the lawbreaking employer for your extra effort. The comparison between your JKL pay and what your XYZ pay would have been should only be for comparable hours. *See Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365 (5th Cir. 1971); *McKnight v. Twin Cities Broadcasting Corp*., 13 CCH Labor Cases Par. 64,067 (D. Minn. 1947).

Fifth, your Army Reserve drill pay should not be deducted from the back pay award. If you had remained continuously employed at XYZ, working Monday through Friday, you would have received that drill pay in addition to not instead of your regular XYZ salary. On the other hand, if you performed two weeks of annual training in the first nine months of 2004, that pay should probably be deducted from the backpay. The annual training pay probably would have been instead of, rather than in addition to, your XYZ pay.

Q: After I left active duty in December 2003, I had TRICARE Transitional for six months, for my husband, my young son, and myself. After June 2004, when the TRICARE Transitional coverage expired, I was concerned about being uninsured, because I did not have coverage at JKL until October 2004, when I was promoted. Both

my husband and my son have had significant health problems, so I could not afford to be uninsured.

While I was employed at XYZ, I had an excellent health insurance package, for which I paid only $100 per month. For July, August, and September 2004, I paid $1,000 per month for family health-care coverage. If I had not been unlawfully denied reemployment in December 2003, I would not have incurred this expense in July–September 2004. Is this expense reimbursable under USERRA?

A: Yes. Under Section 4317(b) of USERRA, you were entitled to immediate reinstatement of your health insurance coverage upon your prompt reemployment, after returning from service. In addition to the backpay, the employer (XYZ) is required to compensate you ($2,700) for the health insurance premiums that you had to pay because the employer violated USERRA ($3,000 you paid minus $300 you would have paid if you had been back at work at XYZ during that time).

USERRA specifically provides, "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." 38 U.S.C. 4323(d)(1)(B)

Q: I was employed by XYZ since December 1999, and I had a pension plan at XYZ. If I had remained continuously employed, I would have reached the five-year point at XYZ, and I would have been vested in the pension plan, as of December 2004, one year after I returned from active duty. I have a pension plan at JKL, but I have started all over, as a new employee for pension purposes, as of April 2004, when I

started my job at JKL. Am I entitled to compensation for this circumstance?

A: Yes. I describe USERRA's pension provisions in considerable detail in Law Reviews 4, 9, 40, 74, 75, 76, and 107. If you had never been mobilized, or if you had been properly and promptly reinstated by XYZ in December 2003, you would be much better off now as far as preparation for your retirement years. XYZ should be required to pay you for what is necessary to put you in the position (at least roughly) that you would now be in if you had been continuously employed.

One way to measure the damage would be to obtain the cost today of an annuity or Individual Retirement Account that would at least roughly make up for what you have lost. Let us say, for purposes of discussion, that the cost would be $4,000.

Q: In a deposition, the employer's attorney asked me pointed questions about my efforts to find gainful employment during the first three months of 2004. The employer is arguing that I had a "duty to mitigate damages" and that I "breached" this duty. What gives?

A: It is true that you had a duty to mitigate your damages by seeking and, if possible, accepting suitable alternative employment. But "failure to mitigate damages" is an affirmative defense for which the employer has the burden of proof. *See Hanna v. American Motors, Inc*., 724 F.2d 1300, 1307 (7th Cir.), *cert. denied*, 467 U.S. 1241 (1984).

To prevail on the "failure to mitigate damages" argument, XYZ will be required to prove that there were other jobs available to you with reasonable effort on your part and that you failed to make such an

effort. I do not think that the employer will be able to meet that burden of proof, because three months is not an inordinate period of time; the judge is not going to find it hard to believe that it reasonably took you three months to find another job. It would perhaps be different if you had been unemployed for three years.

I receive questions about this issue all the time. My advice to folks in this situation is that you document your efforts to find work. You should create a logbook in which you record every job application that you complete and every interview that you do. If you are later faced with an employer argument that "she didn't even try to find a job," you can pull out that logbook to show the efforts that you made to mitigate your damages.

Q: I will be receiving in 2005 or maybe even 2006 money that I should have received in 2004. Inflation has degraded some of the value of that money, and I lost the opportunity to invest the money and earn interest during all those intervening months. I think that economists call this the "time value of money." Am I entitled to compensation for the effects of the delay in paying me what I am owed?

A: Yes. *See Hanna*, 724 F.2d at 1310-12 (holding that the District Court's refusal to award prejudgment interest was an abuse of discretion). *See also Hembree v. Georgia Power Co.,* 637 F.2d 423, 429-30 (5th Cir. 1981).

Q: I think that my employer violated USERRA willfully. In December 2003, when I returned from work, the ESGR volunteer carefully explained (orally and in writing) to the company's personnel director that USERRA gave me the right to prompt reemployment despite the

fact that the job that I had held had been filled. The personnel director indicated that she did not want to hear any of this and that she did not want the Federal Government to tell her how to run the company. Does USERRA provide for punitive damages?

A: USERRA does not provide for punitive damages, but it does provide: "The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) [actual compensatory damages] as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful." 38 U.S.C. 4323(d)(1)(C).

In other words, the damages are doubled if the court finds that the violation was willful. USERRA's legislative history provides as follows on this point:

> Section 4322(d) [later renumbered to 4323(d)] provides that the courts are empowered to require employers to comply with the provisions of this chapter, to compensate the employee for any loss of wages or benefits, and to award liquidated damages in the case of willful violations. A violation shall be considered to be willful if the employer or potential employer 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by [the provisions of this chapter].' *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)." House Rep. No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2471. The "liquidated damages" provision is in Section 4323, which applies to cases against states, political subdivisions states (counties, cities, school districts, etc.), and private employers. There is no similar provision in Section 4324, which applies to

cases against federal executive agencies. The Merit Systems Protection Board has no authority to order a federal agency to pay liquidated damages.

Summary: You appear to have established the entitlement to $20,700 in back pay for the period between January and September 2004. You appear to have shown an entitlement to an additional $2,700 for what you had to pay for health insurance coverage, minus what you would have had to pay anyway. The total is $23,400. You are entitled to prejudgment interest, probably computed at the federal funds rate. (Check the business page of your local newspaper, or perhaps the Wall Street Journal. The rate varies, but interest rates are currently pretty low.) Let us say, for ease of computation, that adding in the prejudgment interest brings the amount of the actual damages to $26,000. Adding the present value of an annuity that would make you whole for what you have lost with respect to XYZ pension credit brings the amount of damages to $30,000. If you prevail on the merits, and it sounds like you have a strong case, you are entitled to $30,000 in actual damages.

If you also establish that the employer's violation was willful, you are entitled to an additional $30,000 in liquidated damages. The $5,000 settlement offer is grossly insufficient.

I also invite your attention to Law Review 172 (June 2005), titled "USERRA Has Teeth." Law Review 172 is about the case of *Duarte v. Agilent Technologies, Inc.* In that case, the United States District Court for the District of Colorado ordered Agilent Technologies to pay $383,761 to Marine Corps Reserve LtCol Joseph Duarte. Most of that figure ($324,082) was for front pay—damages for the period after the

court's judgment because it was apparently contemplated that he would not be returning to work for Agilent. Including front pay as well as back pay is a way to make the numbers really add up, but it does not appear that you would be entitled to front pay. You are now earning, from JKL, substantially more than you would have been earning from XYZ, for the period after Oct. 1, 2004.

*Military title shown for purposes of identification only. The views expressed herein are the personal views of the author, not necessarily the views of the Department of the Navy, the Department of Defense, or the United States Government.

This disclaimer was included because, at the time, I had not yet retired from the Navy Reserve. I retired on 4/1/2007.

End of reprint of Law Review 206.

I adhere to what I wrote in 2005 about the computation of damages in USERRA cases. In 2025, Congress improved the provision about liquidated damages for willful employer violations.

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,[4] the Dole Act modernizes and improves the Uniformed Services Employment and Reemployment

[4] *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.

Rights Act (USERRA), 30 years after that law was signed on 10/13/1994.[5]

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.

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

Section 4323 of USERRA[6] 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 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.[7]

[5] *See* Law Review 24047 (October 2024).
[6] 38 U.S.C. § 4323.
[7] 38 U.S.C. § 4323(a)(1).

The Dole Act amended 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 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 backpay 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 violating USERRA willfully.

In your case, you can prove $30,000 in damages and that the employer knowingly violated USERRA. The employer will be required to pay you $50,000 in liquidated damages in addition to the $30,000 in actual damages.

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed
A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

Here is a link to the Maher Legal Services website:

https://www.lawyersdefendingwarriors.com/about.

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

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If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

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