LAW REVIEW[1] 26081
November 2026
The Death of the USERRA Plaintiff Does Not Moot the Case.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.2 USERRA forbids discrimination.
1.4—USERRA enforcement.
1.8—Relationship between USERRA and other laws/policies

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

[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.

the terrible Tuesday morning, ROA started adding new articles each month. We now have more than 2,300 articles on our website, along with a detailed subject index, to facilitate finding articles about specific topics.[3]

In February 2007, we published Law Review 07007. Because this is an important topic, and because almost 20 years have passed since we published the article, we are republishing the article now.

LAW REVIEW 0707 (February 2007)
KIA and USERRA: A Claim Can Survive the Death of the Plaintiff.
By CAPT Samuel F. Wright, JAGC, USNR

I have found a recent Uniformed Services Employment and Reemployment Rights Act (USERRA) case that is both interesting and important. *McLaughlin v. Newark Paperboard Products*, 2006 U.S. Dist. LEXIS 62936 (W.D. Pa. Sept. 5, 2006); *McLaughlin v. Newark Paperboard Products,* 2007 U.S. Dist. LEXIS 805 (W.D. Pa. Jan. 8, 2007).

In September 1998, Newark Paperboard Products hired Michael E. McLaughlin, a lieutenant colonel in the Pennsylvania Army National Guard, as manager of its plant in Greenville, Pennsylvania. LTC McLaughlin worked for Newark Paperboard continuously until he was fired on August 27, 2001, when he returned to work following two weeks of National Guard duty.

LTC McLaughlin sued Newark Paperboard on Oct. 28, 2004, alleging that the firing violated section 4311 of USERRA (38 U.S.C. 4311)

[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.

because it was motivated at least in part by his activities and obligations in the National Guard. Interestingly, LTC McLaughlin was represented by Assistant U.S. Attorney Christy C. Wiegand of the U.S. Attorney's Office in Pittsburgh.

We are finally seeing the U.S. government provide free legal representation in some USERRA cases as Congress intended. I found 11 published USERRA cases decided in 2002 and 2003, and in all 11 cases the plaintiff was represented by private counsel, not by the U.S. Department of Justice (see Law Review 127 at www.roa.org).

LTC McLaughlin was on active duty in Iraq from June 2005 until January 5, 2006, when he was killed in action. On March 3, 2006, the court ordered the substitution of Tamera J. McLaughlin—his widow and administratrix of his estate—as the plaintiff.

As Congress intended, this case was not put on hold when LTC McLaughlin went to Iraq. USERRA's legislative history includes the following statement: "

> If the employee is unlawfully discharged under the terms of this section [section 4311] prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing the claim should not await completion of the service, even if for only lost wages.

House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News*, pages 2456-57; see Law Review 35 at www.roa.org).

LTC McLaughlin's death rendered moot any discussion of his right to reemployment with Newark Paperboard, but it does not render moot his claim for back pay for the period between his firing and his mobilization. See Law Reviews 206 and 0611 for a comprehensive discussion of the computation of damages under USERRA.

Newark Paperboard filed a motion for summary judgment, contending the plaintiff had not established a prima facie case that LTC McLaughlin's military service was a motivating factor in the decision to fire him. Newark Paperboard also argued that it had established, sufficiently for summary judgment, that it would have terminated LTC McLaughlin regardless of his military service to save the plant's relationship with a major customer, American Brass. Newark Paperboard's "customer preference" defense presents an interesting issue. As I explained in Law Review 0609, customer preference is never a valid defense to a violation of U.S. equal employment opportunity laws, including USERRA.

Judge Terrence F. McVerry of the U.S. District Court for the Western District of Pennsylvania denied the motion for summary judgment, pointing out the proximity in time between LTC McLaughlin's military service and the firing; in fact, the firing was communicated to him the day he returned from his two-week Guard training. The judge also pointed to a history of statements by LTC McLaughlin's Newark Paperboard supervisors, expressing irritation about his time away from work for Guard service.

Furthermore, Judge McVerry held, "The absence of direct evidence of improper motivation is not fatal to the plaintiff's case," citing *Tagget v. Eaton Corp*., 2001 U.S. Dist. LEXIS 18389 (E.D. Mich. 2001). (See Law Review 0701 in THE OFFICER, January 2007, and at www.roa.org.) Judge McVerry also cited and relied upon *Maxfield v. Cintas*, 427 F.3d 544 (8th Cir. 2005), a case I discuss in detail in Law Review 205.

The case did not go to trial, because the parties reached a settlement, as frequently happens in cases of this kind—it is referred to as "settling on the courthouse steps." I don't know the amount of money that changed hands because that figure is covered by a confidentiality agreement, but suffice it to say that Mrs. McLaughlin is satisfied.

ROA congratulates the U.S. Department of Justice and the U.S. Attorney for the Western District of Pennsylvania for their excellent work in this case.

In another new case, the U.S. Court of Appeals for the 9th Circuit overturned a summary judgment for the defendant employer granted by the district court. The employer claimed, and the district court agreed, that the plaintiff (a Marine Corps Reservist) had lost his job in a reduction-in-force (RIF) and that there was no material issue of fact. The appellate court reversed, pointing to statements by the plaintiff's supervisors, prior to the RIF, to the effect that the plaintiff was "skating on thin ice" with management because he insisted on taking leave to "play soldier" (*Simmons v. Herbalife International of America*, 2005 U.S. App. LEXIS 12323; 9th Cir. June 14, 2005).

The court of appeals also held that a question of an employer's intent is always a question of fact that cannot be decided on summary judgment based solely on the employer's declarations, citing *Gifford v. Atchison, Topeka, and Santa Fe Railroad*, 685 F.2d 1149, 1156 (9th Cir. 1982).

The point is that it is possible to make a prima facie case of a section 4311 violation without an employer admission or a "smoking gun." Employers are becoming more sophisticated and "lawyered up." We are seeing more cases where there is no direct evidence that a decision to fire or lay off an employee was motivated by the employee's service in the National Guard or Reserve. Competent and diligent counsel for plaintiffs can prove improper motivation by circumstantial as well as direct evidence.

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

This disclaimer was included in Law Review 07007 because, at the time, I had not yet retired from the Navy Reserve. I retired 4/1/2007.

End of reprint of Law Review 07007.

In this case, Mrs. McLaughlin, the substituted plaintiff after the death of LTC McLaughlin, sought a jury trial, and Newark Paperboard, the defendant, opposed submitting the case to a jury. It had been held that under the 1940 reemployment statute that was superseded by USERRA on 10/13/1994 there was no right to a jury trial because these cases

were "equitable" in nature.[4] Did the 1994 enactment of USERRA change the analysis and give USERRA parties the right to trial by jury?

This issue arose in a 2006 case in the United States District Court for the Northern District of Illinois.[5] Jerome Maher, a Navy Reservist, sued the City of Chicago, his employer, alleging violations of the Veterans' Reemployment Rights (VRR) law, formerly codified at 38 U.S.C. 2021-2026, and the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4335. As I explained in Law Review 104, Congress enacted USERRA in 1994 as a complete recodification of the VRR law, which can be traced back to 1940. The effective date of USERRA is December 12, 1994. Mr. Maher filed suit under the VRR law, as well as USERRA, because some of the employer actions about which he complained occurred prior to USERRA's effective date.

The City of Chicago initially demanded a jury trial but later withdrew that demand and moved to strike the plaintiff's jury-trial request. Magistrate Judge Jeffrey Cole denied the motion and held that the plaintiff was entitled to a jury trial on his USERRA claim.

The Seventh Amendment to the U.S. Constitution, part of the Bill of Rights, provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." Judge Cole pointed out in his well-written opinion that section 4323(d)(1)(C) of USERRA[6] provides for the court to award liquidated damages in the amount of the actual damages (thus, to double the damages) in case of willful violations.

---

[4] *See Troy v. City of Hampton,* 756 F.2d 1000, 1003 (4th Cir. En banc), *cert. denied sub nom. Blackmon v. Observer Transportation Co.,* 474 U.S. 864 (1985).

[5] *Maher v. City of Chicago,* 2006 U.S. Dist. LEXIS 87508 (N.D. Ill. Nov. 21, 2006).

[6] 38 U.S.C. § 4323(d)(1)(C).

In Judge Cole's view, and in the view of other courts that have considered this issue, the addition of the liquidated damages remedy transforms the nature of a reemployment rights case from an equity case to a case at law, and therefore the right to trial by jury applies.[7]

Employers generally fear juries in USERRA cases, especially during the Global War on Terrorism. Public opinion is sharply split on the wisdom of the war but, unlike during the Vietnam War, the public strongly supports the troops.

Newark Paperboard, through its counsel, pointed out that the language of USERRA's "liquidated damages" provision was borrowed from the Age Discrimination in Employment Act (ADEA) and that under the ADEA the right to liquidated damages for willful violations did not survive the death of the ADEA plaintiff. Accordingly, Newark Paperboard argued that the right to collect liquidated damages under USERRA did not survive the death of the plaintiff and that the right to a jury trial therefore did not apply.

Judge McVerry firmly rejected this argument:

> The Court cannot accept Defendant's indirect and formalistic reasoning. Because the class of persons protected by USERRA are exposed to a unique risk of death in the service of the nation, a simplistic adoption of ADEA precedents regarding the survival of claims after death is hardly proper. Simply put, Congress could rationally intend to provide for survival of remedies available to

[7] *See also Nino v. Haynes International Inc.*, 2005 U.S. Dist. LEXIS 43971 (S.D. Indiana Aug. 19, 2005).

members of the armed forces under USERRA that may not be available to victims of age discrimination under the ADEA.

Moreover, Defendant's methodology is incompatible with the clear mandate from Congress, the Supreme Court, and the Third Circuit that the USERRA statute should be construed broadly. Finally, it is not clear why an arbitrary classification as "remedial" or "penal" should be conclusive of the distinct question of whether a right of recovery survives death.

It is even less clear why such a classification should limit the right to recover liquidated damages under USERRA when the statutory text contains no such limitation. In summary, although there is support for each step of Defendant's proposed analysis, it fundamentally misses the point. The Court's task is to give effect to Congress' intent. As explained above, the Court concludes that Congress did not intend the right to recover liquidated damages under USERRA to cease upon a service member's death in combat.[8]

After Judge McVerry set the case for a jury trial, Newark Paperboard sweetened its settlement offer and Mrs. McLaughin accepted the offer.

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

[8] McLaughlin v. Newark Paperboard Prods., 2007 U.S. Dist. LEXIS 805, *8-10.

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.**

Join the Organization That Fights for You

This article is one of more than 2,300 "Law Review" articles available at Law Center | ROA— a free legal resource that the Reserve Organization of America (ROA) has built and maintained since 1997, adding new articles every month.

ROA is the only national military organization dedicated exclusively to America's reserve components — all eight of them. From the 6,179 members of the Coast Guard Reserve to the 329,705 soldiers of the Army National Guard, ROA exists to serve the nearly 773,000 men and women who answer the call while maintaining civilian lives. No other organization does what we do for the people we serve.

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.

Beyond this library of legal resources, ROA files amicus curiae ("friend of the court") briefs in the Supreme Court and other courts and actively educates service members, military spouses, attorneys, employers, legislators, and others about the legal rights of those who serve — and how to enforce them. We provide this information to all service members, regardless of membership. But it's ROA members — through their dues and contributions — who make it possible.

Your membership makes the mission possible.

If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just $20 for a full year, or $450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. Spouses, widows, widowers, ancestors (parents or grandparents), and lineal descendants of past or present service members are also eligible to join, so families can stand with those who serve. Join online at Reserve Organization of America - ROA or call 800-809-9448. 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:
Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002