

LAW REVIEW¹ 26071

October 2026

USERRA Forbids Discrimination, Even in “Employment at Will”

Situations. State Right to Work Laws Are Irrelevant.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.2—USERRA forbids discrimination.

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

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 (VRRRA—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 VRRRA 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 VRRRA 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.

that terrible Tuesday morning, ROA started adding new articles each month. We now have more than 2,000 articles on our website, along with a detailed subject index, to facilitate finding articles about specific topics.³

In 2006, we published Law Review 0619. Because this is an important topic, and because 20 years have passed since we published the article, we are republishing the article now.

LAW REVIEW 0619

Effect of State Employment-at-Will and Right to Work Laws.

By CAPT Samuel F. Wright, JAGC, USNR

Q: I was on active duty from 1990 to 1994 and then briefly in the Army Reserve. I stopped actively participating in 1996, but after 9/11 I reconsidered and recently signed up again. Before signing up, I consulted with my supervisor at work, and she strongly discouraged me from rejoining the Army Reserve.

I signed up anyway, without informing her. Then, I brought in a letter from my new commanding officer, outlining my upcoming military training dates. Just days after I gave the employer this notification, the employer summarily fired me, with no explanation other than “it just does not seem to be working out.” When I suggested that firing me could violate the Uniformed Services Employment and Reemployment Rights Act (USERRA), the employer denied that my Army Reserve service had anything to do with the decision to fire me.

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.

I have worked for this company for five years, and my job evaluations have always been satisfactory or better. This is a non-union company, and I am not the first employee fired with no explanation. The employer's personnel director insists that because our state (Virginia) is an "employment-at-will" state and a "right-to-work" state, USERRA does not apply, that the employer is not required to provide any explanation for the decision to fire me, and that no explanation will be provided.

I contacted the National Committee for Employer Support of the Guard and Reserve (ESGR), which referred me to a local ESGR volunteer, who told me that the employer is essentially correct and that without an admission of employer wrongdoing or a "smoking gun" there is nothing that can be done about my firing.

Please explain to me what "employment at will" and "right to work" mean. Is the employer correct?

A: The employer and the ESGR volunteer are wrong, but I hear this misconception expressed all the time.

Neither Virginia's "employment at will" doctrine nor its "right to work" law defeats your rights under USERRA. I need more information to say for sure, but it sounds like you have a strong USERRA case.

In Virginia and every other state, an individual is considered to be an "employee at will" unless there is a state law in effect that provides due process steps that must be completed before firing the person (often the case for state and local government employees), or unless the

person is represented by a union that has negotiated a collective bargaining agreement (CBA) with the employer, limiting discharges to “just cause.” More than 80 percent of all employees in this country are employees at will.

As I explained in Law Review 108, USERRA most definitely applies to the employment-at-will situation, including to “probationary” employment. Any law that does not apply to employment-at-will is a useless law.

If you are an employee at will, the employer does not need a reason to fire you; the employer is permitted to fire you for any reason, **except a reason that is forbidden by a specific federal or state law.** The employment-at-will doctrine meant a lot more 100 years ago than it means today, because of all the federal (and later state) employment laws that have been enacted in the past 70 years.

In 1935, Congress enacted the National Labor Relations Act (NLRA). In 1940, Congress enacted the precursor to USERRA. In 1964, Congress enacted the Civil Rights Act—title VII of that law forbids employment discrimination on the basis of race, color, sex, religion, or national origin. Many more such laws have been enacted in recent years (Age Discrimination in Employment Act, Americans With Disabilities Act, whistleblower protection laws, etc.).

Virginia’s “right to work” law is even more remote from your case. Under the NLRA, once a union has been certified by the National Labor Relations Board (NLRB) or voluntarily recognized by the employer, the union has a duty of fair representation to all employees in the bargaining unit (usually all non-supervisory employees of the

employer), including employees who have chosen not to join the union and pay dues.

Unions frequently complain that employees in the bargaining unit who benefit from union representation but do not pay dues are “free riders” enjoying the benefits of the union without paying any part of the costs. In a state that does not have a “right to work” law, it is permissible for the union and the employer to agree to a CBA that includes a “union security” clause. Such a clause would require employees in the bargaining unit to pay a fee to the union, as a condition of employment.

Section 14(b) of the NLRA permits a state to enact and enforce a state “right to work” law. Such a law makes it unlawful for a union and an employer to agree to a CBA that makes payments to the union a condition of employment. Virginia and 20 other States have enacted “right to work” laws. Virginia’s “right to work” law is important, but it has absolutely no effect whatsoever on your rights under USERRA. The “right to work” issue is a red herring in your case.

Section 4311 of USERRA, 38 U.S.C. 4311, makes it unlawful for an employer or prospective employer to deny an individual initial employment, retention in employment, promotion, or any benefit of employment on the basis of the individual’s membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service in the future. I have discussed section 4311 in detail in Law Reviews 11, 35, 36, 61, 64, 122, 150, 162, 198, and 205.

I invite your attention specifically to Law Review 122. That article makes it clear that it is unlawful for an employer to forbid an existing

employee to join a Reserve Component or to discharge or otherwise discipline an employee for joining without notifying the employer first or over the employer's objection. It sounds to me like this is exactly what has happened in your case.

Q: What must I prove in order to establish a violation of section 4311?

A: You must prove that your membership in the Army Reserve and your upcoming military obligations or activities was a motivating factor (not necessarily the sole reason) for the employer's decision to fire you. If you prove motivating factor, the burden of proof (not just the burden of going forward with the evidence) shifts to the employer to prove you would have been fired even if you had not been a member of the Army Reserve.

Q: How can I prove that my Army Reserve obligations were a motivating factor in the employer's decision to fire me?

A: As I explained in Law Review 205, one factor that the courts look for is the proximity in time between the protected activity (rejoining the Army Reserve and notifying the employer of your military training obligations) and the employer's decision to fire you. In your case, I think the proximity in time may be sufficient to make out a prima facie case of a section 4311 violation and to shift the burden of proof to the employer.

I am continually frustrated when ESGR volunteers and even Department of Labor investigators say that nothing can be done without an employer admission or a "smoking gun." As employers become more sophisticated and "lawyered up," they will avoid making

such admissions or providing such smoking guns. It is most important to establish that no employer admission or smoking gun is necessary to establish a violation of section 4311. There are other ways to prove that the employer considered improper factors in making an employment decision.

The views expressed in this article 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 in Law Review 0619 because, at the time, I had not yet retired from the Navy Reserve. I retired 4/1/2007.

End of reprint of Law Review 0619.

For more recent articles about section 4311 of USERRA and employment discrimination against service members, please see Law Review (LR) 26031 (July 2026), LR 25043 (November 2025), LR 22054 (September 2022), LR 21068 (October 2021), LR 20049 (May 2020), and LR 17016 (May 2017).

You do not need an employer admission or a “smoking gun” to prevail in a section 4311 case. ESGR volunteers and DOL-VETS investigators who say otherwise need to be retrained.

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?

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:



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