

LAW REVIEW¹ 25020

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My Employer Fired me while I am on Active Duty. What Do I Do Now?

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

1.2—USERRA forbids discrimination,

1.3.1.2—Character and duration of service.

1.3.1.3—Timely application for reemployment.

1.3.2.1—Prompt reinstatement.

1.4—USERRA enforcement.

Q: I am a Captain in the Air Force Reserve and a life member of the Reserve Organization of America (ROA).³ I have read with great interest several of your “Law Review” articles about the Uniformed

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “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), 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. For 45 years, I have collaborated 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 (VRRRA—the 1940 version of the Federal reemployment statute) for 38 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. You can reach me by e-mail at <mailto:swright@roa.org>.

³ The factual set-up for this article is hypothetical but realistic. Over the years, I have received many inquiries like this.

Services Employment and Reemployment Rights Act (USERRA). This is a great free resource! I joined your organization as a life member because I want to support this great service that you are providing for Reserve Component (RC) service members.

On the civilian side, I am the Principal Chef for a “fine dining” restaurant—let us call it Quisling’s Norwegian Seafood Restaurant (QNSR) in Norway, Kansas. On 2/14/2025, I gave oral and written notice of my expected absence from work for military service, starting on 4/1/2025, to Mr. Vidkun Quisling, the owner-operator of the restaurant. On 2/13/2025, I received Air Force orders to perform active duty at a distant location from 4/1/2025 through 3/31/2026, and I notified my civilian employer the very next day.

Mr. Quisling strenuously objected to my notice. He told me that he had not granted my request for a military leave of absence and that if I miss any work, he will fire me. I told him that I am not required to ask for or obtain his permission to be absent from work to perform military service—I am only required to give him notice, and I have done that.⁴ Our argument about this legal point was not resolved.

I worked every scheduled shift at the restaurant through Monday, March 31. On Tuesday morning, I traveled to the place of my military duty and reported as ordered. I expect to leave active duty on 3/31/2026, at the end of my current orders.

On Saturday, 4/5/2025, Mr. Quisling sent me a certified letter, telling me that I had been fired for missing four consecutive days of work. How should I respond to this letter? When I am released from active duty on 3/31/2026, will I have the right to reemployment at QNSR despite this purported firing?

⁴ You are correct that you are only required to give the employer notice. You are not required to ask for or obtain the employer’s permission before you absent yourself from work to perform uniformed service. See 20 C.F.R. § 1002.87.

Answer, bottom line up front:

If you meet the five USERRA conditions for reemployment after you leave active duty, you are entitled to reemployment as a matter of federal law. The characterization of your status while you are on active duty is not especially relevant. I suggest that you send Mr. Quisling a polite letter, and I am attaching (below) a sample. Getting into an extended argument with the employer about what your reemployment rights may be 11 months from now serves no useful purpose.

Q: Mr. Quisling said that he has retained an attorney and that he will sue me, seeking a declaratory judgment saying that I will never have the right to return to work for his restaurant. What do you say about that?

A: USERRA specifically precludes such employer-initiated lawsuits. USERRA provides: “An action under this chapter [USERRA] may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).”⁵

USERRA’s legislative history explains the purpose and effect of this provision as follows: “Section 4322(d)(5) [later renumbered as 4323(f)] would provide that only persons claiming rights or benefits under chapter 43 may initiate an action; i.e., no declaratory judgment actions by employers, prospective employers, or other entities (such as pension plans or unions) may be filed.”⁶

Q: What conditions do I need to meet to have the right to reemployment at the restaurant?

⁵ 38 U.S.C. § 4323(f).

⁶ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), 1994 USCCAN 2449, 1993 WL 235763 (Leg. Hist.). This committee report is reprinted in its entirety in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted sentence can be found on page 722 of the 2024 edition of the *Manual*.

A: As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five 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 “service in the uniformed services” as defined by USERRA.⁷
- b. You must have given the employer prior oral or written notice.⁸
- c. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years.⁹
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.¹⁰
- e. After release from the period of service, you must have made a timely application for reemployment with the pre-service employer.¹¹

Q: Mr. Quisling has already told me that he has fired me. What is the point in my applying for reemployment when I am released from active duty next spring?

A: You must meet the five conditions to have the right to reemployment. This includes having made a timely application for reemployment after release from the period of service. I advise you to

⁷ 38 U.S.C. § 4312(a).

⁸ 38 U.S.C. § 4312(a)(1).

⁹ 38 U.S.C. § 4312(c). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

¹⁰ 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious offences) and OTH (“other than honorable”) administrative discharges.

¹¹ After a period of service that lasted more than 180 days, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

apply for reemployment within 90 days after you leave active duty on 3/31/2026.

Please see Law Review 25011 (March 2025) for a sample application for reemployment letter.

Please join or support ROA.

This article is one of 2,200-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. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).¹²

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” 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 adequate national security. For more than a century, we have argued

¹² See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight¹³ uniformed services, you are eligible for membership in ROA,¹⁴ and a one-year membership only costs \$20 or \$450 for a life membership. 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 <https://www.roa.org/page/memberoptions> 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:

¹³ Congress recently established the United States Space Force as the eighth uniformed service.

¹⁴ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002¹⁵

Here is a sample of the letter that you might send to the employer to respond to the notice that you have been fired:

Mr. Vidkun Quisling
Quisling's Norwegian Seafood Restaurant
123 Dunkirk St.
Norway, KS 66612

Dear Mr. Quisling:

I am responding to your certified letter, in which you informed me that you have fired me from my job at your restaurant for having been absent, during my current period of active duty In the United States Air Force. Please be advised that my absence from work to perform Air Force service is protected by a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I am informed that if I meet the five USERRA conditions for reemployment, I will have the right to prompt reinstatement into the job that I would have attained if I had remained continuously employed (probably the job I left). The characterization of my current status at the restaurant is not relevant to my rights when I leave active duty and apply for reemployment.

I will keep you informed of my status, but at this point there is no point in our arguing about what my rights may be 11 months from now,

¹⁵ You can also contribute on-line at www.roa.org.

when I expect to be released from active duty. If you have questions about USERRA, please contact the Department of Defense organization called “Employer Support of the Guard and Reserve” or ESGR. The number is 800-336-4590. You may also wish to check out www.roa.org/lawcenter, and specifically Law Review 25020 (May 2025).

Thank you for your support of National Guard and Reserve service members like me.

Respectfully,

Captain Jimmy Doolittle, USAFR