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Southwest Airlines Agrees to Change its Policy and Pay $18.5 Million To Settle a Class-Action USERRA Lawsuit Brought by ROA Members.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.3.2.10—USERRA's furlough or leave of absence clause

1.4—USERRA enforcement

1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

An aviation-industry newsletter called *Aviation Direct* has reported that Southwest Airlines (SWA) agreed to pay $18.5 million to settle a class-

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,200 "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 veterans' benefits administered by the Department of Veterans Affairs, 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 (VRRA—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 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 mailto:swright@roa.org.

action lawsuit claiming that the airline violated the "furlough or leave of absence clause" of the Uniformed Services Employment and Reemployment Rights Act (USERRA) by refusing to give **paid** military leave to SWA employees who were part-time service members in the Reserve Components of our nation's armed forces and who had been absent from their SWA jobs for short periods of military training or service. I have attached a link to the *Aviation Direct* article at the end of this article.

The lawsuit was brought by two SWA pilots on behalf of themselves and all other similarly situated SWA employees. I reported on the filing of this lawsuit in Law Review 21015 (March 2021).

Q: What is a class-action lawsuit?

A: The term "class-action lawsuit" has been defined as follows:

> A class action lawsuit is one person or a small group of people suing on behalf of a larger group of people who have all suffered the same injury.
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> These injuries can be physical or financial, ranging from concussions to money lost on products that were defective or falsely advertised.
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> When someone is injured, either financially or physically, he or she may be able to sue the person or company responsible for causing the injury. If this person has only suffered a relatively minor loss (anywhere between 10 and several thousand dollars), it may not be financially viable for him or her to file an individual lawsuit. In other words, the potential award the person could receive does not outweigh the expected cost of litigation.
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> For Example

> A person buys a defective clothes dryer made by Wessex Appliances, Int., and it breaks within three years of use. It would not be worthwhile for this individual to file his or her own lawsuit against the manufacturer, as the cost of litigating the case would outweigh its potential recovery – most likely $700 (the cost of replacing the dryer) plus any additional damages the court deems appropriate.
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> If this clothes dryer, however, was sold to 100,000 consumers across the country and each contained the same defect that led to the premature failure, the potential recovery in the case could be upwards of $70 million ($700 x 100,000).
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> Fortunately, this does not mean this individual is without legal recourse.
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> Class-action lawsuits provide legal relief to large numbers of individuals who were wronged by a corporation and only suffered relatively small monetary losses. Class action lawsuits are typically filed by one person or a small group of people on behalf of all those who were harmed in the same way ("class members"). This means that while the class members are not the ones filing the lawsuit, they will be able to receive a part of any settlement or court award that results from the case.[3]

This lawsuit was brought by two SWA pilots, Major Jayson K. Huntsman, USAFR, and Lieutenant Colonel David Cash, USAFR. This is not the first time that Major Huntsman, a life member of ROA, has agreed to be the named plaintiff in a USERRA case against SWA. He has shown great courage by agreeing to lend his name to a case that benefits himself and hundreds of his SWA colleagues. Bravo Zulu to Major Huntsman and Lieutenant Colonel Cash.

[3] https://www.classaction.org/learn/what-is-a-class-action.

Bravo Zulu also to the four attorneys who represented Huntsman, Cash, and the class of SWA pilots who also serve in the Reserve Components of the United States armed forces. They are Thomas Jarrard, Matthew Crotty, Mike Scimone, and Joseph R. Barton. Thomas Jarrard and Matthew Crotty are ROA members.

Q: What is USERRA's "furlough or leave of absence" clause?

A: Section 4316 of USERRA provides, in pertinent part, as follows:

> Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be:
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> **(A)** deemed to be on furlough or leave of absence while performing such service; and
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> **(B)** entitled to such other rights and benefits not determined by as are generally provided by the employer of the person to having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.[4]

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[5] Section 8(c) of the STSA provided as follows:

[4] 38 U.S.C. § 4316(b)(1).

[5] Public Law 76-783, Chapter 720, § 8, 54 Stat. 890 (September 16, 1940). *See* Appendix S-2 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The pertinent language can be found at pages 1569-71 of the 2025 edition of the *Manual.*

> Any person who is restored to a position in accordance with the provisions of the provisions of paragraph (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces,* shall be so restored without loss of seniority, *shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces,* and shall not be discharged from such position without cause within one year after such restoration.[6]

Thus, it can be said that the "furlough or leave of absence" language has been part of the reemployment statute from the beginning, 85 years ago.

USERRA's legislative history includes the following instructive paragraphs:

> Section 4315(b) [later renumbered as 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with a promise of reemployment, is of no effect. *See Green v. Oktibbeha County Hospital,* 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985).
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> Accordingly, while away on military leave, the servicemember would be entitled to participate in whatever non-seniority related benefits are accorded to other employees on non-military leaves

[6] Id. Emphasis supplied. This paragraph can be found on page 1570 of the 2025 edition of the *Manual.*

> of absence, *See Winders, supra.* In contrast, benefits which are seniority-based would not be limited to the treatment accorded employees on non-military leaves of absence, but are to be accorded, after reemployment, as if the servicemember had remained continuously employed under the escalator principle.
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> The Committee [House Committee on Veterans' Affairs] intends to affirm the decision in *Waltermyer v. Aluminum Company of America,* 804 F.2d 821 (3rd Cir. 1986), that, to the extent that the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded to the military leave, regardless of whether the non-military leave of absence is paid or unpaid.[7]

Section 4331(a) gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers.[8] DOL promulgated USERRA Regulations in 2005, and the Regulations can be found in title 20 of the Code of Federal Regulations (C.F.R.) part 1002. The pertinent section is as follows:

> **Which non-seniority rights and benefits is the employee entitled to during a period of service?**
>
> (a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those

[7] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part `). This committee report is reprinted in its entirely in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 729-30 of the 2025 edition of the *Manual.*

[8] 38 U.S.C. § 4331(a).

established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[9]

In Law Review 23026 (May 2023), I wrote:

In several of the amicus curiae ("friend of the court") briefs that we have filed, and in several of our "Law Review" articles, we (the Reserve Organization of America) have taken the position that an employer must grant *paid* military leave to an employee who is away from his or her civilian job for a short period of military

[9] 20 C.F.R. § 1002.150 (bold question in original).

training or service if and to the extent that the employer grants paid leave for comparable periods of leave for non-military reasons (like jury service).[10] In 2021, the 7th Circuit (Chicago) and the 3rd Circuit (Philadelphia) agreed with our position, and now the 9th Circuit (San Francisco) has joined this chorus.[11] The other ten circuits have not yet addressed the question.[12]

Q: What are the 3rd Circuit, the 7th Circuit, and the 9th Circuit?

A: In the federal court system, there are 93 federal district courts, including one or more for each state. At the intermediate level, there are 13 "Courts of Appeals" or "Circuit Courts." Of course, at the top of the federal court system is the United States Supreme Court.

The 3rd Circuit is the intermediate federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the United States Virgin Islands. The 7th Circuit is the intermediate federal appellate court that sits in Chicago and hears appeals from federal district courts in Illinois, Indiana, and Wisconsin. The 9th Circuit is the intermediate federal appellate court that sits in San Francisco and hears appeals from federal district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, the Northern Marianas Islands, Oregon, and Washington.

Q: Does the "furlough or leave of absence" clause only apply to airline pilots?

[10] *See generally* Law Review 21067 (October 2021) and Law Review 21014 (March 2021).
[11] *See White* and *Travers,* cited at the top of this article. The three published Court of Appeals decisions deal with pilots for airlines (United Air Lines and Alaska Air Lines) and a cargo carrier (FedEx), but this legal principle is not limited to pilots.
[12] When the other circuits address this question, they will likely follow the lead of the 7th Circuit, the 3rd Circuit, and now the 9th Circuit. If another circuit reaches the opposite conclusion on this point, that will set up a conflict among the circuits, and it would likely then be necessary for the Supreme Court to grant certiorari to resolve the conflict.

A: No, this provision is not limited to airline pilots. After we published Law Review 23026 in May 2023, the 11th Circuit[13] followed the 3rd, 7th, and 9th Circuits in interpreting the "furlough or leave of absence" clause liberally and correctly.[14] On this issue, we are now 4-0 in the Circuits. Four circuits have considered this issue, and all four have agreed with our broad interpretation. When the other circuits have occasion to consider this issue, they will most likely follow the four circuits that have already addressed the issue favorably.

Q: Is it possible that the Supreme Court will agree to hear this issue and will overrule the four circuits that have agreed with position?

A: Yes, that is possible but unlikely. The final appellate step in the federal court system is to apply to the Supreme Court for a writ of certiorari. Certiorari is granted only if four or more of the nine Justices vote for certiorari during a conference when hundreds of certiorari petitions are considered and only a handful are granted. The Supreme Court grants certiorari in about 1% of the cases where it is sought.

When the Supreme Court grants certiorari, it is usually because there is a conflict among the circuits. On this issue, there is no conflict because the four circuits that have addressed the issue have ruled similarly.

Q: In this settlement, did SWA agree that its policy of denying paid military leave in these situations violated USERRA?

A: No. As is almost always the case in settlement agreements, the defendant did not admit that its prior policy violated the law. SWA agreed to change the policy and to compensate employees who suffered financial loss based on the prior policy. Of course, companies

[13] The 11th Circuit is the intermediate federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.

[14] *See Myrick v. City of Hoover,* 69 F.4th 1309 (11th Cir. 2023). That case applies the furlough or leave of absence clause to police officers in the City of Hoover, Alabama. I discuss *Myrick* in detail in Law Review 24038 (July 2024). *See also* Law Review 24037 (July 2024), discussing the application of this clause to major companies like Walmart and Amazon.

do not ordinarily pay $18.5 million to settle a case unless they reasonably believe that they are going to lose.

Q: Did the Reserve Organization of America (ROA) file an amicus curiae ("friend of the court") in the SWA case?

A: No, because the case was settled in the district court before trial. We normally file amicus briefs in the United States Supreme Court and other appellate courts.[15]

Q: The collective bargaining agreement (CBA) between SWA and the Southwest Airlines Pilots Association (SWAPA) provides for paid leave for jury duty, illness, and some other reasons. The CBA does not provide paid leave for military service. Why is that not binding on the SWA pilots?

A: In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress secured the veteran under the Act."[16]

Q: What is the relationship between USERRA and collective bargaining agreements?

A: USERRA provides:

> (a)
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> Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that

[15] *See generally* Law Review 24028 (May 2024) for a detailed discussion of what ROA seeks to accomplish and has accomplished by filing amicus briefs.

[16] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). In that same case, the Supreme Court held that the reemployment statute should be "liberally construed for he who has laid aside his civilian pursuits to serve his country in its hour of great need." *Fishgold,* 328 U.S. at 285.

> establishes a right or benefit that is more beneficial to, or is in addition to, a right or provided for such person in this chapter.
>
> (b)
>
> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[17]

The pertinent section of the DOL USERRA Regulation is as follows:

> **How does USERRA relate to other laws, public and private contracts, and employer practices?**
>
> (a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.
>
> (b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

[17] 38 U.S.C. § 4302.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.[18]

Please join or support ROA.

This article is one of 2,300-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

[18] 20 C.F.R. § 1002.7 (bold question in original).

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).[19]

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 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.

[19] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight[20] uniformed services, you are eligible for membership in ROA,[21] 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002[22]

Here is a link to the article about the SWA settlement:

https://aviation.direct/en/High-costs-for-military-exemption%3A-Southwest-Airlines-pays-185-million-US-dollars#google_vignette

[20] Congress recently established the United States Space Force as the eighth uniformed service.
[21] Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join. ROA members recently amended the ROA Constitution. Ancestors and lineal descendants of past or present members of the U.S. armed forces are now eligible to join ROA.
[22] You can also contribute on-line at www.roa.org.