

# **LAW REVIEW 14066**

**May 2014**

## **Military Leave and State University Policy**

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

**1.1.1.7—USERRA applies to state and local governments**

**1.1.3.7—USERRA applies to an examination to determine fitness for uniformed service**

**1.2—USERRA forbids discrimination**

**1.3.1.1—Left job for service and gave prior notice**

**1.3.2.11—Vacations, holidays, and days off**

**1.4—USERRA enforcement**

**1.8—Relationship between USERRA and other laws/policies**

**Q: I am a Major in the Army Reserve and a member of ROA. I am also an assistant professor (non-tenured) at a state university in a southern state. I get considerable hassle from my more senior colleagues (especially the department chairman and the dean) about my Army Reserve duties. Their objection is partly practical and partly ideological. Like any employer or supervisor, they object when my military duties inconvenience the department and my colleagues, but they also object to military service in general. Both the department chairman and the dean attended college and graduate school during the Vietnam War, and they spent their student days resisting the draft and demonstrating against the war. They hated military personnel then and hate them more now.**

**The university's handbook contains the following paragraphs about military service by employees of the university:**

Military leave is provided for any ordered military duty in the service of the State of . . . or the United States, including service training/schools conducted by the armed forces of the United States. Such duty, not exceeding a total of 30 days in any calendar year, is designated as "ordered military duty," regardless of whether the orders are issued with the consent of the employee.

Regular employees are entitled to up to a maximum of 18 days (144 hours) of *paid* leave in a calendar year (or in any one continuous period) while engaged in the performance of military duty and while going to and from such duty during normal working hours.

In order to receive military leave with pay, the employee must submit prior to the leave a copy of his or her orders. The department must submit a payroll action form documenting the anticipated dates of absence with orders attached.

Once all paid military leave has been exhausted, paid time off is continued automatically by utilization of accrued vacation leave. If an employee does *not* wish to utilize accrued vacation time, they must make that request in writing in advance to the Benefits Office of Human Resources.

If a military leave is to be longer than 30 days total, individuals must request a personal leave of absence or must resign their employment with the University. Personal leave without pay may be granted for a period not to exceed one year. Under federal legislation, individuals returning from active duty may have certain reemployment rights for a period generally not to exceed five years.

Any regular faculty member required to take a Selective Service or physical examination is eligible for paid military leave according to the above provisions if the exam is scheduled during normal working hours. The employee must submit the documentation of the exam with a report of absence form.

**I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>1</sup> Is the university’s written policy on military service consistent with USERRA?**

**A:** No. I can see three ways that this written policy is directly contrary to the requirements of USERRA, and the reference to a “Selective Service or physical examination” is badly out of date.<sup>2</sup> I suggest that this

---

<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 1,057 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. ROA initiated this column in 1997 and adds new articles each week, including 169 new articles in 2013 and another 66 so far in 2014.

<sup>2</sup> Congress abolished the draft 41 years ago, in 1973, so employees of the university will not be ordered to report to their local draft boards for physical examinations, but USERRA’s definition of “service in the uniformed services”

policy should be rewritten to make it consistent with USERRA and to eliminate anachronisms and correct grammatical errors. Here are the three ways that the written policy directly violates USERRA:

**a. Charging absences from work for military training or service to the employee's vacation days without the employee's explicit request.**

Section 4316(d) of USERRA provides: "Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, *upon request of that person*, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service."<sup>3</sup>

Let us say that Joe Smith, an employee of the university, has enlisted in the Marine Corps Reserve. Because he has never served in the armed forces previously, Joe will need to attend "basic training" or "boot camp" and then some elementary military training in his chosen specialty. Joe will be away from his civilian job for this military training about six to eight months, and he fully expects to return to his university job at the end of this military training period.

---

includes "a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty." 38 U.S.C. 4303(13). For example, let us say that Mary Smith, an employee of the university, is trying to enlist in any branch of the armed forces, either Active Component or Reserve Component. As part of the enlistment process, she will need to take 2-3 days off from her civilian work to travel to the closest Military Examination and Processing Station (MEPS) for a physical and other examinations, and the MEPS is not open on weekends. At the end of the examination, even if she is found unfit for military service, she is entitled to return to her civilian job, provided she meets the five USERRA conditions, which are discussed later in this article. As a practical matter, I recommend that Mary use her vacation days or make other arrangements to get to the MEPS, so that she will not have to inform her civilian employer that she is trying to join the military until it is certain that she will in fact be joining. Please see Law Review 13083 (June 2013).

<sup>3</sup> 38 U.S.C. 4316(d) (emphasis supplied).

While employed by the university, Joe has used very little vacation time. At the time he leaves his job to report for military training, Joe has 33 unused vacation days in the bank. Under the university's written policy, these 33 vacation days will be expended during his military leave period of six to eight months, immediately after he exhausts his 18 days of paid military leave under state law.

Joe may or may not want to utilize his 33 vacation days in this way. Joe will not continue accruing additional vacation days from his civilian employer while he is away from his job for military service.<sup>4</sup> If Joe utilizes all of his vacation days while on this military duty and does not accrue any additional days, he will be unable to take any paid time off from his university job for some months after he returns to work, following the military period. Accordingly, Joe may prefer to take "leave without pay" during his military duty, in order to preserve his opportunity to take a vacation during the months following his return to work.

The written university policy puts the onus on Joe to make a specific request that his vacation days not be expended during his military service time. This is backwards. Under section 4316(d), Joe should not be charged for these vacation days unless he has specifically requested to use his vacation days in this way.

**b. Requiring the employee to resign if his or her military service period is expected to last more than one year**

The university's written policy requires the employee to resign his or her university job if the expected period of military service is for more than one year or if the university has turned down his or her request

---

<sup>4</sup> See *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). The citation means that you can find this 1975 Supreme Court decision in Volume 420 of *United States Reports*, starting on page 92. I invite your attention to Law Review 0907 (February 2009) for a detailed discussion of the implications of this case.

for a “personal leave of absence.” Requiring the individual to resign his or her job is contrary to USERRA.

USERRA’s 1994 legislative history provides: “Section 4315(b) [later renumbered 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), *aff’d*, 770 F.2d 1078 (3<sup>rd</sup> Cir. 1985).”<sup>5</sup>

**c. Implying that the university, as employer, has the discretion to approve or disapprove an employee’s request to be absent from work for military service**

Alexandra Adams will be leaving her university job for voluntary or involuntary military service. The university’s written policy clearly implies that she must “request leave” and that her supervisor or the university itself has the discretion to deny her request for time off from work for military service. In fact, Alexandra does not need the employer’s permission, and the employer does not get a veto on Alexandra absenting herself from her civilian job in order to perform service. The Department of Labor USERRA Regulation provides as follows:

**Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?**

---

<sup>5</sup> House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2466.

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.<sup>6</sup>

**Q: What is the relationship between the university policy and state law?**

**A:** As a state government agency, the university is subject to the requirements of state law, including the individual employee's entitlement to 18 days of *paid* military leave. The first three paragraphs of the policy address paid leave.

**Q: What is the relationship between USERRA (on one hand) and state law and university policy on the other hand?**

**A:** USERRA is a floor and not a ceiling on your rights. A state law or university policy can give you *greater or additional rights* (like the right to 18 days of paid military leave) but cannot take away the rights that Congress has provided for you by enacting USERRA. Section 4302 of USERRA provides:

(a) 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 establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit 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

---

<sup>6</sup> 20 C.F.R. 1002.87 (bold question in original). The citation means that you can find this provision in title 20 of the Code of Federal Regulations, at section 1002.87.

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.

38 U.S.C. 4302 (emphasis supplied).

The United States Constitution expressly provides that a federal statute like USERRA trumps a conflicting state statute or constitution: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>7</sup>

As a nation, we are commemorating the sesquicentennial of a great war fought about the supremacy of federal authority over state authority. State officials in your part of the country sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

**Q: Is it possible to get a federal court to order the university to rewrite the policy to bring it into compliance with USERRA?**

**A:** Probably not. It is the *practice* of an employer that complies with or violates USERRA, not a written policy. There are tens of thousands of employers (federal, state, local, and private sector) that have written policies that are inconsistent with USERRA. Some employers comply with USERRA by ignoring their own written policies.

---

<sup>7</sup> United States Constitution, Article VI, Clause 2. This provision is commonly called the “Supremacy Clause.” Yes, it is capitalized just that way, in the style of the late 18<sup>th</sup> Century.

This is not to say that the written policy is irrelevant. Under section 4323(d)(1)(C) of USERRA, the court is to award double damages (called “liquidated damages”) if the court finds that the employer has violated USERRA *willfully*. If the university continues applying its written policy after the illegality of the policy has been brought to the university’s attention that would be the basis for awarding double damages.

If a lawsuit is brought on behalf of a person whose USERRA rights have been violated, consideration should be given to bringing a class action lawsuit to obtain relief for all affected persons, including persons who may be affected in the future.

**Q: If I am to make a career out of teaching at the college level, I need *tenure*. The tenured professors in my field will decide whether I get tenure, and it is very competitive and often very political. I am concerned that those tenured professors will discriminate against me based on my membership in the Army Reserve and my occasional absences from work for Army training and service. If I am denied tenure, do I have a potential remedy under USERRA?**

**A:** Yes. If you are denied tenure, you can challenge the denial under section 4311 of USERRA, which provides:

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such

person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited--

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 U.S.C. 4311.

Let us assume that you are denied tenure and you challenge the denial under section 4311. To prevail, you must establish, by a preponderance of the evidence, that your Army service and obligations amounted to a *motivating factor* in the employer's decision to deny you tenure. You need not establish that your military service was *the sole reason* for the denial of tenure.

If you establish the *motivating factor*, the burden of proof shifts to the employer, to *prove* (not just say) that you would have been denied tenure even if you had not been in the Army Reserve.

Going forward, I suggest that you concentrate primarily on doing the best job you can in teaching, research, writing, and other responsibilities—to meet the criteria for tenure. You should also keep careful notes on any anti-military statements made by the dean, the department chairman, and the tenured professors in your department, but don't be obtrusive about your note-taking.

Good luck, and please let me know how this turns out.