

# **LAW REVIEW 14092**

December 2014

## **Working at Civilian Job during Drill Weekend**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>1</sup>

- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.3—Timely application for reemployment
- 1.3.2.7—Adequate rest before and after service
- 1.6—USERRA regulations
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a senior noncommissioned officer (NCO) in the Army Reserve. I joined the Reserve Officers Association (ROA) recently, after you amended your Constitution to make NCOs eligible for full membership.**

**I learned of ROA through your “Law Review” column.<sup>2</sup> Your articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) are spot-on and have been most useful to me in dealing with my own civilian employer and also in advising junior personnel in our unit.**

**We have a Private First Class (PFC) in our unit who works at an oil-refinery that is a “continuous process” operation. Let’s call him “Joe Smith.”**

**The oil refinery operates 24 hours per day and 365 days per year. Joe works the night shift, Wednesday through Sunday, from 8 pm to 4 am the next morning. It has come to my attention that during our drill weekends Joe works Friday night, Saturday night, and Sunday night at his civilian job. After he gets off work at 4 am Saturday morning, he drives two hours to our drill site, puts on his uniform, and drills for eight hours, and he does the same thing Saturday evening and all day Sunday, and then works at his civilian job Sunday evening also.**

**I became aware of Joe’s grueling work and travel schedule when I noticed that he was sleeping during an important lecture on Sunday afternoon of our drill weekend. I discussed the matter with Joe in private and stressed to him that he must be awake and paying attention during training because we are expected to learn during drill weekends important things that are essential to safety and mission accomplishment if we are mobilized. In the 13**

---

<sup>1</sup> Captain Wright is the Director of the Service Members Law Center at the Reserve Officers Association. He can be reached by telephone at (800) 809-9448, ext. 730. His e-mail is [SWright@roa.org](mailto:SWright@roa.org).

<sup>2</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find almost 1300 “Law Review” articles 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 we add new articles each week.

**years since the terrorist attacks of September 11, 2001, being called to active duty involuntarily from the Army Reserve is no longer just a theoretical possibility. I was called up for a year in 2005-06 (for service in Iraq) and for another year in 2009-10 (for service in Afghanistan).**

**I am very concerned about Joe's safety during our Saturday and Sunday drills, during his civilian work shifts on Friday, Saturday, and Sunday evenings, and during his automobile travel between these places. During our drill weekends, Joe is frequently expected to drive a vehicle with other soldiers on board. If Joe falls asleep at the wheel, this is dangerous for him and for other soldiers as well.**

**Is it lawful for the employer to make Joe work on Friday, Saturday, and Sunday evenings during the drill weekend? I plan to bring this situation to the attention of our unit Commanding Officer (CO). How do you suggest that she should deal with these concerns?**

**A:** First, you are correct to be concerned about the safety of Joe and his colleagues in the Army Reserve, as well as his colleagues at his civilian job and other drivers and pedestrians on the road. Your CO has a duty *and responsibility* to ensure that Joe is reasonably rested and fit for duty during his drill weekends.

I invite your attention to *Gordon v. Wawa Food Markets*, 388 F.3d 78 (3<sup>rd</sup> Cir. 2004).<sup>3</sup> Willie Gordon was an Army Reservist, living and working in New Jersey and drilling in Virginia. After the end of his drill weekend, he drove home to New Jersey and stopped by the convenience store where he worked, although he was not scheduled to work Sunday evening. His intent was to pick up his paycheck and his schedule for the coming week.

The store manager insisted that Gordon clock in and work the Sunday evening shift at the store, apparently because another employee had not showed up for work. Gordon insisted that he was exhausted and unable to work Sunday evening after his drill weekend and drive home, but the store manager threatened him with termination of his job and he worked. At the end of the Sunday evening shift (early Monday morning), he was killed when he fell asleep at the wheel of his automobile while driving the short distance from the store to his home.

Gordon's mother (administrator of his estate) sued Wawa Food Markets, Inc., contending that the fatal accident was the proximate result of the employer's unlawful insistence that Gordon work the Sunday night shift or be fired. The district court dismissed the lawsuit under Rule 12(b)(6) of the Federal Rules of Civil Procedure—holding that the mother was not entitled to any relief that the court could award even if the facts were exactly as she alleged them to be in her complaint. The mother appealed and the 3<sup>rd</sup> Circuit panel affirmed, holding: "As the District

---

<sup>3</sup> The citation means that you can find this case in Volume 388 of *Federal Reporter Third Series*, and the case starts on page 78. This is a decision by the United States Court of Appeals for the Third Circuit, the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, and Pennsylvania. I invite your attention to Law Review 156 (January-February 2005) for a detailed discussion of the implications of this case.

Court concluded, Section 4312(e) [of USERRA] is written entirely in terms of an employee's duties, as opposed to an employer's obligations. There is no way to construe the statutory language as conferring a substantive right to eight hours of rest for the returning employee."

The death of Willie Gordon was a tragedy that could have been avoided if he had better understood his USERRA rights and had simply refused to work the Sunday night shift, as he had every right to do under USERRA. Moreover, in retrospect, it would have been better if he had not shown up at the store on his way home Sunday evening.

To facilitate understanding, let us discuss separately the right of Joe Smith to time off from his civilian job on the front end (before reporting for drill Saturday morning) and on the back end (after completion of the drill on Saturday and again on Sunday).

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act, which goes back to 1940. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, the Secretary published proposed USERRA regulations in the *Federal Register*. After considering the comments received and making a few adjustments, the Secretary published the final USERRA regulations in December 2005. The regulations are published in the Code of Federal Regulations (C.F.R.) in Title 20, Part 1002.

One section of the DOL USERRA Regulations addresses Joe Smith's issue squarely:

**Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?**

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site *and arrive fit to perform the service*. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

*(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.*

*(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.*

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

20 C.F.R. 1002.74 (emphasis supplied) (bold question in original).

Joe's statutory right to time off on the back end, after completion of the Saturday drills and the Sunday drills, is even clearer. After completion of a period of service of *less than 31 days* (like a four-hour drill period or a two-week annual training period), the service member is required to report back to work at the civilian job "not later than the beginning of the first regularly scheduled work period on the first calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence."<sup>4</sup> Thus, it is unlawful for the employer to require Joe to report to work Saturday evening because he performed uniformed service on Saturday or for the employer to require him to report for work Sunday evening because he performed uniformed service on Sunday.

A reservist completing a drill weekend on Sunday afternoon is normally required to report for work at the normal reporting time on Monday.<sup>5</sup> Joe's situation is different, however, because he is not normally scheduled to work on Monday evening. In Joe's situation, he is required to report back to work at 8 pm Wednesday evening (the start of his next regularly scheduled work period), after his drill weekend.

It should be emphasized that USERRA does not require the employer to pay Joe for a shift that he does not work. Perhaps Joe is working at his civilian job Friday, Saturday, and Sunday nights in order to maximize his earnings. The CO needs to make clear to him that going forward he will not be permitted to drill and will not be paid for Saturday and Sunday drills unless he is fit for duty both days, and that means having had enough sleep so that he will not fall asleep during a lecture or (worse) while at the wheel of a vehicle.

**Q: Joe has tried to get the civilian employer to reschedule his civilian work schedule around his drill weekends so that he will not lose money by going to drill. Is the employer required to make that sort of accommodation?**

**A:** Unfortunately, no. I invite your attention to *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).<sup>6</sup>

Roger D. Monroe worked for the Standard Oil Co. at its refinery in Lima, Ohio. The refinery was a "continuous process" and operated 24 hours per day, 365 days per year. Mr. Monroe and his colleagues worked five consecutive eight-hour days per week, but in a different five-day

---

<sup>4</sup> 38 U.S.C. 4312(e)(1)(A)(i).

<sup>5</sup> If the reservist has a long trip home Sunday evening, after completion of the drill weekend, the individual is required to report for work by the start of the regular work period on Tuesday.

<sup>6</sup> The citation means that you can find this case in Volume 452 of *United States Reports*. This case was decided by the United States Supreme Court in 1981.

sequence each week. In this way, the burden of working weekends was equitably distributed among the employees.

Mr. Monroe was also a member of the Ohio Army National Guard, and he participated in inactive duty training one weekend each month. His drill weekends frequently conflicted with scheduled work in the refinery. When this occurred, Mr. Monroe attempted to rearrange his refinery schedule around his drill requirement by trading shifts with other employees. When he was unable to arrange a shift swap, the employer granted him an unpaid leave of absence from his refinery job on those Saturdays and Sundays when he was scheduled to drill with the National Guard. Section 2024(d) of the reemployment statute [then codified at 38 U.S.C. 2024(d)] clearly required the employer to grant this leave of absence.

Mr. Monroe was a junior enlisted member of the National Guard. When he was forced to miss eight hours or 16 hours of his 40-hour workweek, because of his National Guard drill requirement, he lost money, since his drill pay was substantially less on a daily basis than his refinery pay. That pay loss was the genesis of his complaint.

Mr. Monroe's National Guard drill weekend was generally on the same weekend each month, and he had informed his employer months in advance of the weekends when he would be unable to work because of his military training obligation. He requested that the employer rearrange his work schedule around his drill weekends, so that he would not lose money because of his National Guard training.

At the time this case went to the Supreme Court, section 2021(b)(3) of the reemployment statute [then codified at 38 U.S.C. 2021(b)(3)] provided as follows: "Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve Component of the armed forces." Mr. Monroe asserted that the opportunity to work and be paid for a 40-hour week was an "incident or advantage of employment" protected by section 2021(b)(3), and he argued that the quoted language imposed upon the employer the obligation to rearrange his schedule around his drill weekends.

Mr. Monroe sued, with the assistance of the Department of Labor and the Department of Justice. He prevailed in the District Court, which awarded him \$1,086 for those days when, the court found, the employer should have made scheduling accommodations but did not. *Monroe v. Standard Oil Co.*, 446 F. Supp. 616 (N.D. Ohio 1978). The employer appealed, and the Court of Appeals reversed. *Monroe v. Standard Oil Co.*, 613 F.2d 641 (6th Cir. 1980). The Supreme Court granted *certiorari* because of the apparent intercircuit conflict, referring to *West v. Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980).

In a 5-4 decision written by Justice Potter Stewart, the Supreme Court affirmed the 6th Circuit's dismissal of Mr. Monroe's complaint. The Court cited the legislative history of section 2021(b)(3) and held, "The legislative history thus indicates that section 2021(b)(3) was enacted

for the significant but limited purpose of protecting the employee-Reservist against discriminations like discharge and demotion, motivated *solely* by Reserve status.” *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981) (emphasis supplied).

This quoted language had unfavorable consequences that the Supreme Court probably did not intend or anticipate. In *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988), the U.S. Court of Appeals for the 10th Circuit cited the quoted language and held that a Reservist claiming to have been fired because of his Reserve obligations must prove that the discharge was motivated *solely* by the Reserve obligations. As you can imagine, it is most difficult to prove that anything that happens can be attributed *solely* to something else—human life is seldom that simple.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), a complete rewrite of the reemployment statute construed by the Supreme Court in *Monroe*. Section 4311 of USERRA (38 U.S.C. 4311) is a much broader and stronger anti-discrimination provision than section 2021(b)(3). Section 4311(c) of USERRA provides that an individual challenging a discharge or other alleged discrimination is only required to prove that the protected factor (like performance of uniformed service) was *a motivating factor* (not necessarily the sole reason) for the employer’s unfavorable action. USERRA’s legislative history clearly indicates that the intent of section 4311(c) was to overrule *Monroe* and *Sawyer* on this “motivated solely” issue. I invite the reader’s attention to Law Review 0739 for a detailed discussion of *Monroe*, *Sawyer*, and the USERRA legislative history on this point.

While USERRA clearly superseded *Monroe* on the “solely motivated” issue, I believe that *Monroe* is still good law on the basic issue decided by the Court. When a Reserve Component member’s military training schedule conflicts with the civilian job schedule, the employer is clearly required to grant the employee time off (at least time off without pay) so that the employee can attend the military training without risk of losing the civilian job. But the employer is not required to rearrange the employee’s work schedule in order to protect the employee from loss of pay in cases where the hourly civilian pay exceeds the hourly military pay. See *Rogers v. City of San Antonio*, 392 F.2d 758 (5th Cir. 2004).

As a result of the Law Review column, I hear from Reserve and National Guard members every day, with USERRA questions and problems. I occasionally hear complaints like Mr. Monroe’s: I lose money when I drill, and I want the employer to rearrange my civilian work schedule so that I can work and be paid for the same number of hours, and also perform my military training. Much more commonly, I hear the exact mirror-image of Mr. Monroe’s question.

For example, I recently heard from a nurse—a nurse as a Reservist and a nurse in her civilian job. Like the oil refinery at issue in *Monroe*, a hospital must operate on weekends and overnight. She used to work at the civilian hospital every other weekend. As recommended by Employer Support of the Guard and Reserve (ESGR), she notified the civilian hospital’s chief nurse of her Reserve drill schedule for the entire fiscal year. The chief nurse then rearranged her civilian weekend work schedule around her drill weekends. As a result, this nurse either

drills or works at the civilian hospital almost every weekend. Unlike Mr. Monroe, her priority is on having some weekends off, not on maximizing her income.

I believe that requiring an employee to work on a day that he or she otherwise would have had off, in order to “make up for” the employee’s absence for uniformed service on another day, is a violation of USERRA. I invite the reader’s attention to Law Review 103 (“Do I Have To Work on My Day Off?”) and Law Review 140 (“Do I Have To Work on My Day Off?—Part 2”).

**Q: During our last drill weekend, Joe tried to arrange a shift swap with Mary Jones, another employee of the refinery. Mary has a different work schedule and Joe promised to work some Monday and Tuesday night shifts (shifts he was not otherwise scheduled to work) for Mary, if she would cover for his Friday, Saturday, and Sunday shifts during his drill weekend. Mary agreed to this swap arrangement, but the employer vetoed it because it would have required the employer to pay Mary time-and-a-half for the some of the hours that she worked to cover for Joe’s drill. What gives?**

**A:** The Fair Labor Standards Act (FLSA) is a federal statute that was enacted during the Great Depression of the 1930s. Certain managerial and professional employees are exempted from the FLSA overtime rules, but for all other employees there is a 40-hour work week mandated by federal law. Whenever a non-exempt employee works more than 40 hours in a week, for whatever reason, the employer must pay that person at the time-and-a-half rate (150% of the usual hourly rate) for all hours worked in that week that are beyond 40. The employee cannot waive the overtime requirement, and in the private sector it applies for each week. For example, if Mary were to work 45 hours in Week 1 (because she is covering for some of Joe’s hours) and 35 hours in Week 2 (when Joe is covering for her), the employer is still required to pay Mary at the 150% rate for the extra five hours in Week 1.

Moreover, if Joe were to work more than 40 hours in Week 2, because he was making good on his promise to cover for Mary, the employer would be required to pay Joe at the 150% rate. In this sort of situation, the FLSA immensely complicates the reservist’s attempt to cover for his or her drill weekend by arranging a swap of shifts.