



Military Law News

U.S. Air Force • U.S. Navy • U.S. Coast Guard • U.S. Marines • U.S. Army

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Message from the Chair

Peter Jankell, Esq.

I remember attending a briefing when I was a Lieutenant Commander. As I walked into the briefing room, I realized that this was going to be an important briefing. In addition to the standard Navy breakfast of coffee, donuts, and a Power Point presentation, there were also preprinted, color, glossy, magazine style handouts. Someone had spent a lot of money on this briefing.

The briefing was about something called "Sea Power 21" and very early into the presentation it devolved into what we mid-level officers used to call "Admiral Speak". My eyes glassed over and it became difficult to stay awake as the presentation droned on about things occurring way above my pay-grade that would have little to no effect on my daily duties.

It was not until many years later, after I had served on several flag staffs, that I understood the enormity of Sea Power 21. It was a complete overhaul of how the Navy operates and a revolutionary change to the culture of Navy decision-making and how the Navy conducts preparedness and missions. It was, as we say in the Navy, a major sea-change.

The Military Law Section of the Virginia State Bar is in the midst of what I would describe as a major sea-change of our culture. This change started subtly under my predecessors and, hopefully, will continue under future section leadership. What I have tried to accomplish in my time as section chair is to bring this change to the surface where it can be recognized, implemented, and improved.

Some of you have heard me speak on this change in the past. You may have heard me say that we need to be the "military law section" rather than "the section of former military lawyers". To accomplish that requires a broadening in the focus of the section and expanding our membership beyond former JAGs. We need to change who we serve as a section from servicemembers to lawyers whose practice may be impacted by the military service of one of the parties.

Please do not misunderstand me. Serving the legal needs of servicemembers and veterans is a noble and valuable pursuit. There are many fine aid organizations that do just that, often with the assistance of pro bono lawyers. It just should not be the role of this section. This section is a section of the Virginia State Bar. An organization made up of and for attorneys. According to the VSB, a section is "a separate group devoted to improving the practice of law in a particular substantive area or specialty practice".

In accordance with these principles, the description of the section has changed on our website. It now reads, "Virginia is home to the largest concentration of servicemembers from all branches of the service. These active duty, reserve and retired servicemembers and their families have a multi-billion-dollar impact on the Virginia economy. At some point every attorney in Virginia is likely to confront an issue related to the military, regardless of area of practice. The Military Law Section serves attorneys who

practice in areas likely to be impacted by laws unique to the military and its members." We need to expand what we do as a section to meet this new description.

In the past, we have been very good at covering subjects like, the Uniformed Services Former Spouses' Protection Act (USFSPA), the Servicemembers Civil Relief Act (SCRA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA). In the last few years, the section has presented "Showcase" CLEs at the annual meeting of the VSB regarding the effect of bankruptcy on security clearances and the unique issues confronting guardians *ad litem* in military child custody and visitation cases. These "Showcase" CLEs were a tremendous step in the right direction in expanding our focus and visibility beyond the former JAG community.

We can go so much farther. I was a claims officer back in the day when the Navy had uniformed claims attorneys. We used to say that we were guided by nine federal statutes. These statutes included the Federal Tort Claims Act, the Military Claims Act, the Foreign Claims Act, the Personnel Claims Act, the Federal Medical Care Recovery Act, and the Affirmative Claims Act. There is always discussion about the possibly changing landscape of the *Feres* doctrine and *Feres v. United States*, 340 U.S. 135 (1950).

The mobility of servicemembers makes knowledge of multijurisdictional legislation like the Federal Parental Kidnapping Prevention Act (PKPA), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and the Uniform Interstate Family Support Act (UIFSA) imperative for family law practitioners representing military families. Real estate practitioners have to deal with Veterans Administration guaranteed mortgages. General practice attorneys may be confronted with disability claims in the military and the VA, and have to know the difference between the two. Criminal law attorneys need to know the consequences of a conviction on a servicemember's career and ability to hold a security clearance. A conviction of a domestic violence offense can prohibit a servicemember from carrying a firearm.

Attorneys whose practice might involve contracting with the military certainly need to know the Federal Acquisition Regulation (FAR), the Buy American Act, and the Antideficiency Act. There are also laws like the Law of the Sea, the Law of War, the various Geneva Conventions, and *posse comitatus* that most practitioners will not encounter but might find interesting.

This change in direction is important for the section. I cannot claim credit for it, as it began before my joining the Board of Governors. My hope, however, is that we understand and embrace this change. I, personally, have always been resistant to change. It took me a long time to grasp the significance of Sea Power 21. Having gone through that process, I now know that organizational redefinition can be beneficial.

Peter J. Jankell, Chair

ANNUAL MILITARY LAW SYMPOSIUM 2019: SERVING THOSE WHO SERVE

Section Members can pre-register at a discounted rate of \$125.

- Gain a greater understanding of International Humanitarian Law and explore how ordinary people placed in leadership positions during wartime balance personal and institutional perspectives on morality, law and leadership
- Receive an overview of the recently passed Veterans Appeals Improvement and Modernization Act and the current process for making a claim in the right to appeal under Veterans Administration regulations
- Review the significant updates to the Uniform Code of Military Justice that went into effect on 1 January 2019, including voir dire and panel selection, plea agreements, and sentencing
- Understand the practical challenges of implementing the Servicemembers Civil Relief Act standards and provisions in courts and receive some recommendations on best practices when assisting a client on an SCRA issue.

REGISTER NOW

Live on Site: Friday, May 17
On Marine Corps Base Quantico
Registration: 8:00 a.m.
Program: 8:30 a.m. – 4:00 p.m.
MCLE Credit: 6.0 (Ethics 1.0)
Live-Interactive Credit: 6.0

Standing the Watch for Our Servicemembers' Due Process Rights

By Dwain Alexander, II, Esq.

The Fourteenth Amendment of the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law.¹ Due process is essential to the fair operation of our justice system and the cornerstone of due process is the opportunity to be heard.² In *Mullane v. Central Hanover Bank & Trust Co*, the United States Supreme Court, stated that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce, or contest."³ The existence of a right in law or otherwise is empty without a realistic means to access and employ that right. Timely access to justice and due process can be more difficult for the servicemember. Unlike the civilian counterpart who move less and may have a more flexible work schedule, the geographically transient nature of military duty combined with demanding and sometimes inflexible training, work, and deployment schedules can make providing due process rights to servicemembers challenging for courts and counsel. The requirements of the service provided by the members of our Armed Forces should not result in the loss of their due process rights.

Once due process has been denied and property has been lost, a pledge of redress by reopening the case will not make the servicemember whole. No mechanism exists to undue the harm to mission readiness, or the negative impact on the morale and the welfare of the servicemember. The law does not provide redress for direct, incidental, and consequential damage caused by this denial of due process. The judgment and its consequences make the attack on mission readiness complete. The servicemembers reputation, as well as his or her access to classified information, and financial readiness have all taken a hit. The servicemember's tangible property and intangible assets are subject to seizure and garnishment. Sometimes the allegation of indebtedness is not accurate, mistaken or false. However, even when the debt is valid the loss of the opportunity to make arrangements, settle the debt, or

plan for the effect of the judgment is lost. The servicemember suffers a loss with no timely opportunity resolve the issue. For example:

Many servicemembers set up automatic payments during deployment. In his or her absence and unavailability establishing automatic payments is the responsible thing to do. If a plaintiff obtains a default judgment against the servicemember whether rightfully or wrongfully his or her pay and bank accounts can be garnished. The account set up to pay bills on time will not have funds to make the payments. Creditors and financial institutions will assess late fees and overdraft charges. The bills that do not get paid spiral into a pool of debt and can result in additional judgments and property loss. By the time the servicemember is aware of the problem, it is a massive maze of missed communications, fees, charges, and debt. Without notice, the servicemember whose job depends upon a security clearance and clean credit, cannot make payment arrangements, negotiate a settlement, or adjust other bills and payments to avoid the collateral damage from this judgment. Denial of due process denies these options.

With an understanding and appreciation for the duty and mission of our Armed Forces, Congress sought to provide protections for the servicemember's due process rights through the Servicemembers Civil Relief Act (SCRA).⁴ Specifically, 50 U.S.C. §3931, provides protection for servicemembers in default judgments situations. This Section establishes a process to ensure servicemembers receive due process in civil proceedings.⁵ Because of the vital rights protected by this Section, its implementation requires a consciences and intentional effort on the part of the court and counsel to assure the servicemember's access to justice. Without diligent and thoughtful oversight by the courts and dedicated service from the counsel who represent servicemembers in default proceedings, those who protect our constitutional

rights could lose their rights. When the courts and/or the counsel appointed for the servicemember, the SCRA Representative, fail to understand and enforce protections provided servicemembers by the SCRA, the system of justice they represent fails the servicemember.

Section 3931 provides that in **every** civil proceeding the plaintiff must file an Affidavit of Service noting the respondent's military status.⁶ The Affidavit must include facts sufficient to support the conclusion.⁷ When the respondent is on active duty, the law imposes a series of requirements. The court must issue a 90 day stay of the proceedings.⁸ An attorney, the SCRA Representative, must be appointed to represent the servicemember.⁹ The SCRA Representative is directed to exercise **due diligence** to locate the servicemember, notify him or her of the proceeding, and ascertain if the servicemember has defenses that can be submitted to the court in his or her absence.¹⁰

Virginia Supreme Court Rule 3:3 defines due diligence to include "a devoted and painstaking application to accomplish an undertaking."¹¹ The United States Supreme Court in *Mullane* noted that, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."¹² It is vital to the protection of the servicemember's due process rights that the court and SCRA Representative work vigilantly and diligently to assure the legal and ethical standards required for due process are met.

When the justice system works, and in many instances it does, the servicemember gets notice of the proceeding and allegations, an opportunity to assert defenses, negotiate a settlement, restructure other financial obligations to support compliance with any judgment, and an accurate disclosure of the fees and costs associated with the case. When the system fails, individual situations may vary, but the process usually follows one or more of three patterns: One, the plaintiff or plaintiff's counsel file an inaccurate affidavit of service denying the servicemember SCRA due process protections; Two, the SCRA Representative fails to exercise due diligence in the performance his or her duty denying due process protections; and/or, Three, the court accepts the plaintiff's affidavit of service and/or SCRA

Representative's report without review and does not evaluate the service provided by the SCRA Representative's in awarding attorney fees.

I Plaintiff or Plaintiff's Counsel Fail to Accurately Complete the Affidavit of Service

Attorneys, as officers of the court, have a duty to assure that the facts and statements presented to the court are truthful and accurate.¹³ In cases where the plaintiff or counsel for the plaintiff file an erroneous affidavit the servicemember respondent is denied due process.¹⁴ Counsel should carefully consider if they want to place their reputation and license in their client's hands. Counsel who chose to rely on their client's assertions regarding the respondent's military status may find that the information provided is incomplete with negative consequences.¹⁵ Plaintiff's counsel should take time to verify the respondent's status from available court or client documents. Additionally, if the plaintiff has the full name and birth date or social security number of the respondent, the Department of Defense Manpower Data Center (DMDC) will provide a certificate verifying his or her military status.¹⁶ The certificate is prima facie evidence of the respondent's active duty status.¹⁷ Including the DMDC Certificate of Service with every case where there is a reasonable question regarding the respondent's military status protects the plaintiff, respondent, and the court. Counsel who file a false Affidavit of Service may be subject to criminal penalties and civil damages.¹⁸ To provide notice and education to the Bar, Virginia General District Court (GDC) Forms could be modified to include a box indicating that the DMDC Certificate of Service is attached. Including this option on GDC forms would provide notice to counsel and courts that this method of determining the respondent's military status is available.

Plaintiffs may note on the Affidavit of Service that they were unable to determine the military status of the respondent. When the plaintiff cannot determine the military status of the respondent, the provisions of 50 U.S.C §3931 that would provide due process protections for the servicemember do not apply.¹⁹ In these cases, the court may require the plaintiff file a bond to protect the respondent before entering judgment.²⁰ An Affidavit of Service that indicates the plaintiff was unable to determine the military status of

the respondent should raise a red flag for the court. Most plaintiffs with a business relationship with the respondent should have the full name and social security number or date of birth of the respondent and be able to obtain a Certificate of Service. Even in automobile accidents the driver's license will have the full name and date of birth. This information is also included in the police accident report. The occasions where the military status of the respondent cannot be determined should be rare.

One landlord, through counsel, filed a series of cases with affidavits of service indicating that it could not determine the military status of the respondent because a copy of the military ID was not in the file.²¹ It is unlawful for non-government entities to copy a military ID.²² The fact used to support the Affidavits of Service was the absence of a document that could not legally be used. These affidavits were insufficient on their face, but default judgments were issued. This case was prosecuted by the Department of Justice and settled for \$1,590,000.00 (ONE MILLION FIVE HUNDRED AND NINETY THOUSAND DOLLARS).²³ While it is not the courts duty to investigate attorneys, affidavits, or the SCRA Representative's report, blind reliance on assertions that on their face challenge reasonableness and/or law is not a sound practice. At the time this article was drafted it was not clear if the counsel who may have repeatedly submitted inaccurate affidavits or the court that accepted the affidavits without challenge would face ethical review of their actions. In all cases the court could review the Affidavit of Service in light of the law and known facts. Is the plaintiff a creditor or landlord? Should the plaintiff have an application or other document with sufficient information to access DMDC? Are the facts stated in support of the affidavit reasonable?

Where there is a question regarding the plaintiff's diligence in executing the Affidavit of Service, the court could refuse to accept the affidavit and dismiss or stay the case pending clarification of the respondent's military status. Where the plaintiff's veracity is in question and the facts indicate that the plaintiff knowingly misled the court, the case could be dismissed with prejudice. Where the plaintiff is represented by counsel who commits perjury or intentionally omits relevant factual information, the court, in addition to dismissing the case with

prejudice, should consider training, education and/or disciplinary action.²⁴

II

The SCRA Representative Fails to Exercise Due Diligence in The Performance of His or Her Duty

In 2010, General, John Kelly USMC, RET, gave a memorial speech for two young Marine sentries who stood watch at the barracks gate in Ramadi, Iraq on April 22, 2008.²⁵ During their watch a large truck loaded with 2,000 pounds of explosives turned and entered the short roadway to the barracks. As the truck accelerated the Marines knew immediately what was about to happen. For six seconds the two Marines stood their ground, emptied their weapons, and stopped and destroyed the oncoming truck bomb. Those six seconds of duty saved over one hundred lives. One witness was quoted as saying, "in the name of God no sane man would have stood there and done what they did." Not all servicemembers will face the danger these Marines did, but all have sworn to give everything in service to and defense of this Nation. Every servicemember is a sentry on watch for national defense. The SCRA Representative is the sentry at the gate protecting the servicemember's due process rights.²⁶ When the SCRA Representative stands watch what duty does he or she owe to those who stand at the gate protecting our freedom?

The SCRA Representative is required to use due diligence in his or her efforts to locate the servicemember, notify the servicemember of the pending law suit, and determine if there is a defense to the allegation that can be presented in his or her absence.²⁷ Due diligence requires that the SCRA Representative use that level of effort that a competent attorney would exercise in the performance of his or her duties.²⁸ Due Process requires that the SCRA Representative employ methods reasonably calculated to actually provide notice of the suit with sufficient time for the servicemember to respond.²⁹ In a default judgment situation, the servicemember's access to justice depends upon the vigilance and diligence of the SCRA Representative.

The SCRA Representative acts under circumstances similar to a Guardian Ad Litem (GAL) for an incapacitated adult.³⁰ However, unlike the Virginia GAL program that requires specific training and certification prior to representation,³¹ there is no state

education program for the SCRA Representative and no process to assess or certify the counsel's level of competence. The Professional Responsibility Standards for diligence and competence of counsel are presumed to be adequate to guide the actions of the SCRA Representative and protect the servicemember's rights. The complications of military life and nuances of the processes and procedures of the military are uniquely different from civilian life. Understanding the client and in the case of a servicemember, understanding military life, process, and procedure is a prerequisite to ethical, effective, and efficient service as a SCRA Representative. The military has a completely separate justice system under Uniform Code of Military Justice.³² Military courts, judges, and counsel are trained to understand, interpret and apply military life, process, and procedure in the administration of criminal justice. A similar understanding is also important in protecting servicemember's civil due process rights. Is there a reasonable difference between an attorney appointed for a person who is incapable of assisting with their case and a servicemember who cannot be located to assist with his case? Under the existing standards, convicted incarcerated felons who receive the protections of a statutorily mandated GAL have more due process protections than servicemembers.³³ Servicemembers deserve better. SCRA Representatives deserve better. A certification class could be required prior to appointment as a SCRA Representative. The lack of a certification and training requirement creates an excuse for failure to honorably serve as the SCRA Representative.

SCRA Representatives who repeatedly employ methods that are known to be unsuccessful do not meet the standard for due process or due diligence. An example of one such method is the **two-letter system**. These letters are pre-formatted form documents the same language is used and boxes are checked to indicate actions taken. SCRA Representatives employing this system send one letter to the address provided by the plaintiff on the Summons or Warrant in Debt. This is the same location where service may have been posted because the process server was unable to personally contact the servicemember. There is no realistic expectation that this letter will reach the servicemember to provide timely notice of the pending suit. Even if the address was accurate, the servicemember will not be at that

location if deployed or on temporary duty outside the area. The second letter is sent to the Armed Forces locator service.³⁴ This Service will forward the letter to the servicemember's command. The process can take months depending on the command type, location, deployment status, operational tempo (combat, drills, war games), and the location of the servicemember within that command. In many cases there is no response by the end of the 90-day stay. Can there be any reasonable expectation that the servicemember will receive notice of the proceeding using the two-letter method? Repeatedly applying this same unsuccessful two letter process and claiming a diligent attempt to provide notice is by definition insanity or malfeasance. Attorneys that employ this two-letter process repeatedly with the same result cannot in good faith claim to exercise due diligence or provide due process. Training and education will address some problems with counsel, other more intentional acts may require disciplinary action. Where the SCRA Representative fails to take steps reasonably calculated to locate the servicemember, the court could take action to protect the servicemember's rights. The court could extend the stay an additional 90 days, appoint a new SCRA Representative, require training prior to receiving further appointments, and/or deny the SCRA Representatives attorney fees.

III

The Court Accepts the Plaintiff's Affidavit of Service and/or SCRA Representatives' Report Without Review and Does Not Review the SCRA Representatives Fee Award

In civil default judgment case the standard, as established in *Landcraft Co. v. Kincaid*, is that the respondent use diligence and vigilance to protect their rights, as failure to timely respond to court pleadings has serious consequences.³⁵ The Court in *Landcraft* went so far as to state that, "to relieve a defendant of the consequences of such conduct would be to encourage it. Diligence and vigilance would cease to be the rule; certainty in the result of judicial proceedings would be destroyed...."³⁶ If the default judgment standard for the respondent, usually a layperson, is to exercise diligence and vigilance in meeting his or her legal responsibilities: the standard cannot be lower for the plaintiff, SCRA Representative, and court.

The court's review of a servicemember's SCRA rights begins with the Affidavit of Service and SCRA Representative's report, and should end with the determination of reasonable attorney fees for the SCRA Representative.³⁷ Throughout this process the court has a duty to know what is required under the letter and spirit of the law.³⁸ The Judicial Cannons impose a general duty to be faithful to the law and maintain professional competence. Judges are to accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to the law.³⁹ In a servicemember default judgment case those rights include 50 U.S.C. §3931.

The Affidavit of Service required by Section 3931 should be reviewed for plain error and omission with an inquiry about the DMDC Certificate of Service. The SCRA Representative's report of services should be evaluated based upon the methods employed and the successful or unsuccessful accomplishment of the assigned task. Did the SCRA Representative apply a devoted and painstaking effort to locate and notify the servicemember? Were the actions taken by the SCRA Representative those of an attorney desirous of actually informing the absentee and thus reasonably calculated to provide notice or a mere gesture? Did the SCRA Representative, contact the servicemember? Was inquiry of possible defenses made and if so, were those defenses provided to the court? At a minimum if the SCRA Representative was unsuccessful, did he or she request additional time to fulfill the mission? Did the representation provided meet the ethical and professional standards of the Bar and the legal standard of due diligence for due process?

Virginia Code Ann §8.01-15.2(B) authorizes the court to determine the reasonableness of attorney fees and award fees for the SCRA Representative's service against any party.⁴⁰ However, in GDC cases the fee paid to the SCRA Representative is frequently not disclosed. Unlike other court appointed attorneys, there is no court form, format, or provision for the SCRA Representative to disclose the time and effort (due diligence) represented by his or her fees.⁴¹ In the default cases the servicemember is not there to challenge the service provided or the fee charged. The fees are frequently negotiated in private between the plaintiff and the SCRA Representative. This lack of transparency presents an ethical dilemma. How can the plaintiff be responsible for the determination and

payment of fees for the legal representation of the respondent? Is there a real or apparent conflict of interest where the plaintiff employing the counsel for the defendant has a material and substantial interest in the outcome of the case? What level of service does the servicemember get for the fees the plaintiff chooses to pay the SCRA Representative? Does the servicemember receive fair and ethical representation when the plaintiff and SCRA Representative have private fee arrangements?⁴² The average fee for SCRA Representative services was between \$65.00 and \$85.00 per case. Recent legislation increased and capped that fee at \$125.00 per case.⁴³ The SCRA Representative who previously received \$85.00 per case legislated a 30 percent pay raise for the same work. For the two form letter process which may take 10 minutes and requires no court appearance the actual fee rate is \$750.00 per hour. In this instance a change to general district court forms could provide the disclosure of the SCRA Representative's fees. This change would allow the court to review the fee request in light of reasonableness and effectiveness of the actions taken by the attorney.

The nation acknowledged the demanding duties and sacrifices of our servicemembers. We accepted that to fulfill those duties we require their absence from home and family.⁴⁴ We understood that absence directly impacts the servicemembers ability to participate in some judicial proceedings. We awarded the servicemember special class designation deserving of special treatment and protection so they could focus on protecting us.⁴⁵ The SCRA and state law define the process to provide protections for this special class. State and federal laws that protect the rights of servicemembers are tools that provide equal access to justice and support mission readiness for the Nation's defense. This noble purpose requires that those who stand watch over the servicemember's due process rights exercise the same vigilance and diligence in the performance of their duty as we require from the servicemember.

Dwain Alexander, II is an attorney with the Naval Legal Service Office Mid-Atlantic in Norfolk, Virginia where he serves as a legal assistance attorney representing servicemembers. The views expressed in this article are those of Mr. Alexander and not those of the Department of Defense, Department of the Navy, or any other government agency.

Endnotes

- ¹ Const. Amend. 14, § 1; Va.Const. Art. I, § 11
- ² *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L. Ed. 1363, 34 S. Ct. 779 (1914).
- ³ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950)
- ⁴ 50 U.S.C. §3901-4023, Et Seq
- ⁵ 50 U.S.C. §3931
- ⁶ 50 U.S.C. §3931(b); Va Code Ann §8.01-15.2(A); VA form DC 418
- ⁷ 50 U.S.C. §3931(b)(1)(A)
- ⁸ 50 U.S.C. §3931(d)
- ⁹ 50 U.S.C. §3931(b)(2)
- ¹⁰ 50 U.S.C. §3931(d)(1), (2);
- ¹¹ Va. Sup. Ct. R. 3:3; *Flagler v. Liberty Mut. Ins. Co.*, 73 Va. Cir. 61, 61 (Cir. Ct. 2007)
- ¹² *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 657 (1950)
- ¹³ ABA Model Rules, Rule 3.3; Va. Sup. Ct. R. Pt.6 sec II, Rule 3.3; ABA Model Rules, Rule 3.4; Va. Sup. Ct. R. Pt.6 sec II, Rule 3.4
- ¹⁴ *Heritage East-West, LLC, v. Chi Won Chung et al.*, 6 Misc. 3d 523; 785 N.Y.S.2d 317; 2004; Norfolk CL17003313-00/01, Norfolk GV16010957-00, Virginia Beach GV14039132-00, Virginia Beach GV15036682-00; Chesapeake GV17016145-00
- ¹⁵ *In re DAVID TEMPLEHOFF*; 339 B.R. 49; 2005 Bankr. LEXIS 2808
- ¹⁶ <https://scra.dmdc.osd.mil/scra/#/single-record>
- ¹⁷ 50 U.S.C. §4012
- ¹⁸ *Alvarado v. Collect Access, LLC*, No. 16-cv-1198 DMS (MDD), 2017 U.S. Dist. LEXIS 64240, at *1 (S.D. Cal. Apr. 26, 2017); 50 U.S.C. §3931(c), U.S. v. PRG Real Estate, CASE NO.: 2:19-CV-125, (2019); 50 U.S.C. §3942
- ¹⁹ 50 U.S.C. §3931(b)(3)
- ²⁰ Id
- ²¹ Virginia Beach GV14039132-00, Virginia Beach GV15036682-00, US Dist. Ct. Eastern Div. Case No. 2:19-CV-125
- ²² 18 U.S.C. §701; VA Code Ann §55-248.4
- ²³ <https://www.justice.gov/opa/pr/justice-department-obtains-its-largest-ever-settlement-against-property-management-company>
- ²⁴ *Heritage East-West, LLC, Petitioner, v. Chi Won Chung et al.*, 785 N.Y.S.2d 317,324 (2004); *In re DAVID TEMPLEHOFF*, 339 B.R. 49, 54 (2005)
- ²⁵ *Everyone should read John Kelly's speech about 2 Marines in the path of a truck bomb*, Paul Szoldra, Business Insider, April 22, 2017, <https://www.businessinsider.com/john-kellys-speech-truck-bomb-2017-4>
- ²⁶ 50 U.S.C. §3931(d)(1), (2); Virginia Beach GV17002230-00, Virginia Beach GV17002224-00
- ²⁷ 50 U.S.C. §3931(d)(1), (2)
- ²⁸ VA Code Ann §8.01-9(A); *Ruffin v. Commonwealth*, 10 Va. App. 488, (1990); *Baby Doe v. Doe*, 15 Va. App 242, (1992); Va. Sup. Ct. R. Pt.6 sec II, Rule 6.2 Accepting Appointments, Comment (3); Va. Sup. Ct. R. Pt.6 sec II, Rule 1.1 Competence; Va. Sup. Ct. R. Pt.6 sec II, Rule 1.3 Diligence, Comment (1)
- ²⁹ *Va. Polytechnic Inst. & State Univ. v. Prosper Fin. Inc.*, 284 Va. 474, 481, (2012); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)
- ³⁰ Dwain Alexander, II, *Duties Of The Guardian Ad Litem When Representing A Servicemember*, Virginia State Bar, Military Law Section Letter, 6/2011; <http://www.vsb.org/docs/sections/military/guardianadlitem.pdf>; VA Code Ann §8.01-2(6)(e)
- ³¹ VA Code Ann §64.2-2011; *Standards to Govern the Appointment of Guardians Ad Litem for Incapacitated Persons*, Judicial Council of Virginia, (2015); http://www.courts.state.va.us/courtadmin/aoc/cip/programs/gal/adult/gal_standards_adult.pdf
- ³²
- ³³ VA Code Ann §64.2-201.1
- ³⁴ http://www.navy.mil/navydata/nav_legacy.asp?id=168; The Navy's World Wide Locator is a service established to find the present duty station of active duty personnel. You must have the service member's full name, Social Security number, grade or rank, and, if possible, last known duty station.
- ³⁵ *Landcraft Co. v. Kincaid*, 220 Va. 865, 263 SE. 2d 419, (1980)
- ³⁶ *Landcraft Co. v. Kincaid*, 220 Va. 865, 874 (1980)
- ³⁷ VA Code 8.01-15.2 amended to cap attorney fees at \$125.00.
- ³⁸ Va. Sup. Ct. R. pt. 6, sec. III, Canon 3, *IN RE: INQUIRY CONCERNING A JUDGE*, NO. 13-127, 2015 N.C. LEXIS 480, (2015)
- ³⁹ VA. Sup. Ct. R. pt. 6, sec. III, Canon 3(B)[2],[5],[7]
- ⁴⁰ VA Code Ann §8.01-15.2(B)
- ⁴¹ See: Virginia Court forms DC-52
- ⁴² VA Sup Ct. R. pt 6 sec II, 1.7 Comment (13)
- ⁴³ Virginia, HB 1675, Servicemembers Civil Relief Act; attorney fees.
- ⁴⁴ Major (Professor) John Wigmore House Comm. on the Judiciary Soldiers' and Sailors' Civil R Relief Bill, H.R. Rep. No. 181, 65th Cong., 1st Sess. 9 (1917).
- ⁴⁵ 50 U.S.C. §3902



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Practicing Pitfalls: Compensating for VA Setoffs and Waivers in Equitable Distribution of Military Retired Pay

By Peter J. Jankell, Esq.

Military retirees who are less than 50 percent service-connected disabled are required to offset their retiree pay with the amount of Veterans Administration (VA) disability compensation they receive. 10 U.S.C. § 1414; 38 U.S.C. § 5304. This offset reduces the amount of money a former spouse would receive as an equitable distribution of military retired pay in a divorce. Accordingly, it has long been common in separation agreements for divorce cases to contain a provision where the servicemember agrees not to waive any retirement benefits in order to accept VA disability or, in the alternative, to make up the lost differential to their former spouse.

Until the passage of the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, state courts were precluded from dividing military retirement in a divorce action as part of equitable distribution. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). In 1982 Congress responded to the *McCarty* decision by passing the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. Congress enabled a state to treat veterans' "disposable retired pay" as property divisible upon divorce. 10 U.S.C. § 1408(c)(1). *Howell v. Howell*, 581 U.S. ____, 137 S.Ct. 1400, 1403, 197 L.Ed.2d 781 (2017). In order to prevent double dipping, military retirees may receive disability benefits rated at less than 50% only to the extent that they waive a corresponding amount of military retirement pay. Because disability benefits are exempt from federal, state, and local taxation, military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common. *Mansell v. Mansell*, 490 U.S. 581, 584, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). In *Mansell*, the parties entered into a

property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits. The Court held that the agreement was not enforceable because the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits. *Id.* 594-595.

A recent United States Supreme Court decision reinforces this position. In *Howell v. Howell*, 581 U.S. ____, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017), the Court saw nothing in the circumstances that make a reimbursement award to a former spouse any the less an award of the portion of military retirement pay that was waived in order to obtain disability benefits. Congress specifically omitted that portion from the USFSPA's definition of "disposable retired pay." Accordingly federal law prohibits state courts from awarding to a divorced veteran's former spouse the waived portion. *Mansell, supra*, at 589, 109 S.Ct. 2023, *Howell*, 137 S.Ct. at 1405.

The Court in *Howell* went on to say that a state court cannot avoid *Mansell* by describing the family court order as an order requiring the servicemember to "reimburse" or to "indemnify" the former spouse, rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore that portion of retirement pay lost due to the post-divorce waiver. The amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted. *Howell, supra*, 137 S.Ct. at 1406.

Reading *Mansell* and *Howell* together, it is apparent that any agreement "not to reduce military retirement" or to pursue VA disability is unenforceable. Likewise, any agreement to reimburse the former spouse any amount reduced by

an election of VA disability is also unenforceable. Any attorney who continues to use such wording does so at their own peril.

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About the Section

Virginia is home to the largest concentration of servicemembers from all branches of the service. These active duty, reserve and retired servicemembers and their families have a multi-billion-dollar impact on the Virginia economy. At some point every attorney in Virginia is likely to confront an issue related to the military, regardless of area of practice. The Military Law Section serves attorneys who practice in areas likely to be impacted by laws unique to the military and its members.

The section is open to any member of the bar who is in good standing, members of the judiciary, military attorneys, and law students. The section provides continuing legal education programs throughout the year and has sponsored CLEs at the Virginia State Bar Annual Meeting. In addition, the section publishes and distributes educational materials, including a newsletter, to its members.

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The Uniformed Services Employment and Reemployment Rights Act and the Department of Justice

By Deborah Birnbaum, with contributions by Lisa Moore

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301, *et seq.*, is the federal statute that protects the civilian employment and reemployment rights of members of a uniformed service. USERRA prohibits workplace discrimination on the basis of an individual’s past, present, or future military obligations. It prohibits retaliation by employers against anyone who participates in a USERRA investigation or proceeding, or seeks to enforce his or her USERRA rights. USERRA also provides reemployment rights to eligible servicemembers upon their return from uniformed service or training.



I. Department of Justice USERRA Enforcement Overview

The Department of Justice (DOJ) has the authority to take action against a state, or represent a claimant in an action against a local or private employer, for USERRA violations after receiving a USERRA complaint, referred upon the claimant’s request, from the Department of Labor’s (DOL) Veteran Employment and Training Service. Each USERRA referral includes: (1) the DOL investigative file; and (2) a memorandum that analyzes the USERRA claim(s) and provides an assessment on whether or not the claim(s) has merit. Upon receipt of an

unresolved USERRA claim from DOL, DOJ conducts an independent review of the complete DOL investigative file and analysis. If the Attorney General is reasonably satisfied that the servicemember is entitled to relief, the Attorney General may exercise DOJ’s prosecutorial authority and commence an action in Federal court on behalf of the servicemember. If the employer is a State or State agency, the action is brought in the name of the United States. In all other cases, the United States files suit in the name of the servicemember. DOJ also attempts to seek relief on the servicemember’s behalf and to settle the claim without commencing an action in court. If DOJ determines that it will not offer legal representation to a claimant, or seek relief on the servicemember’s behalf, it informs the servicemember of this decision and notifies him or her that he or she has the right to proceed with private counsel. In all cases, DOJ ensures that each USERRA referral receives careful consideration and is processed as expeditiously as practicable.¹ DOJ publishes all the USERRA complaints that have been filed here

<https://www.justice.gov/crt/employment-litigation-section-cases>.

In fiscal year (FY) 2018, DOJ received a total of 50 referrals from DOL. Seventeen were assessed by DOL as having merit and thirty-three were assessed as not having merit. Out of the cases that were assessed as having merit, DOJ offered representation in six cases, and declined representation in six cases (one of which DOJ facilitated settlement.) Three merit referrals involved state agencies as potential defendants, two of which DOJ declined to pursue litigation in agreement with DOL, and one of which DOJ facilitated a settlement. The remaining two referrals assessed as having merit were still under consideration by DOJ in FY 2018.

The cases referred to DOJ in FY 2018 involved a number of USERRA issues including allegations of discrimination leading to termination and/or loss or denial of benefits, reemployment, and retaliation for asserting USERRA protection.

¹ See USERRA Annual Report to Congress (2017), available at

https://www.dol.gov/vets/programs/userra/USERRA_Annual_FY2017.pdf

II. USERRA Claims Involving Termination following Notice of Service

Recently, there have been at least three USERRA cases referred to DOJ where servicemembers have been terminated by their employers after they gave notice of their upcoming military service and before they returned from service. Among other protections, USERRA's discrimination provision prohibits employers from denying retention in employment and reemployment on the basis of performance of service.² USERRA's reemployment provisions require employers to reemploy servicemembers who satisfy the eligibility criteria.³ Therefore, servicemembers who are not reemployed after service may potentially have claims under both the reemployment provision (provided they satisfy the eligibility criteria) and the discrimination provision of USERRA.⁴ On the contrary, servicemembers who are terminated before leaving for military service may not be considered "absent from a position of employment." Consequently, they may only be able to bring a claim under USERRA's discrimination provisions.

The legal standard in a USERRA discrimination claim is a showing that a 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." 38 U.S.C. § 4311(c)(1) (emphasis added). In contrast, to show entitlement to reemployment the standard is demonstrating that the eligibility criteria have been met. 38 U.S.C. § 4312. The statute provides three defenses to reemployment; "(1) An employer is not required to reemploy a person under this chapter if—(A) the employer's circumstances

have so changed as to make such reemployment impossible or unreasonable; (B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or (C) the employment from which the person leaves to serve in the uniformed services is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." 38 U.S.C. § 4312(d). In a discrimination case, the statutory defense is "the employer [] prove[s] that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311(c)(1).

In *Rebecca Cruz v. City of Glendale*, Cruz told her supervisor that she expected to be receiving orders shortly for National Guard duty.⁵ She provided her supervisor with her written military orders one week later and the next day, her direct supervisor and her supervisor's supervisor held a meeting with human resources and made the decision to terminate Cruz. One week later, before Cruz left for military service, she was informed of her termination. DOJ's complaint alleged that the City of Glendale violated USERRA's discrimination provision by terminating Cruz in response to her request for leave for military service in the National Guard.

Similarly, in *Larry Green v. Watermark Solutions*, Green notified his supervisor that his four-month Air Force Reserve training would begin in three weeks, after having already initially informed his supervisor a month earlier of the possibility of training.⁶ In response, Green was told he was terminated because

² 38 U.S.C. § 4311(a); 20 C.F.R. § 1002.18.

³ 38 U.S.C. § 4312; 20 C.F.R. § 1002.32.

⁴ Note that USERRA provides for protection against discharge except for cause for service members who have been reemployed already and whose period of service was for more than 30 days.

"c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days." 38 U.S.C. § 4316.

⁵ Complaint, *Cruz v. City of Glendale*, No. 2:17-CV-02733 (D. Ariz. Aug. 14, 2017), ECF No. 1 available at <https://www.justice.gov/crt/case-document/file/992261/download>.

⁶ Complaint, *Green v. Watermark Solutions*, No. 2:18-CV-04739-ESW (D. Ariz. Dec. 18, 2018), ECF

a temporary replacement could not be hired. DOJ's complaint alleges Watermark Solutions violated USERRA's discrimination provision by terminating Green on the basis of his military service obligations.

Servicemembers who are terminated while away on service may be able to meet the eligibility criteria of the reemployment protections of USERRA if they can show, among other things, that they have made a timely request for reemployment, and thereafter bring a reemployment claim.

Section 1002.32: What criteria must the employee meet to be eligible under USERRA for reemployment after service in the uniformed services?

(a) In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, he or she will be eligible for reemployment under USERRA by meeting the following criteria:

- (1) The employer had advance notice of the employee's service;
- (2) The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;
- (3) The employee timely returns to work or applies for reemployment; and,
- (4) The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.

(b) These general eligibility requirements have important qualifications and exceptions, which

are described in detail in §§ 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for reemployment unless the employer establishes one of the defenses described in § 1002.139. The employment position to which the employee is entitled is described in §§ 1002.191 through 1002.199.

20 C.F.R. § 1002.32.

In *Bobby Lindsay v. Bridges Consulting*, Lindsay, a reservist in the Coast Guard, deployed for a three-month tour of duty after giving notice.⁷ Towards the end of Lindsay's deployment he notified his employer that he expected to return to work at the conclusion of his deployment but his employer responded that he was no longer an employee of the company. Lindsay extended his orders several times and several times requested reemployment. DOJ's complaint alleged both that Bridges Consulting failed to reemploy Lindsay in violation of USERRA's reemployment provisions and that Bridges Consulting terminated Lindsay on the basis of his membership in the Coast Guard, his absence to perform military service, and/or his military service obligations, in violation of USERRA's discrimination provisions.

DOJ will continue to pursue zealous enforcement of USERRA under the reemployment provision, discrimination provision, or both, as appropriate.

Deborah E. Birnbaum is a Trial Attorney for the Civil Rights Division of the U.S. Department of Justice.

No. 1 available at <https://www.justice.gov/crt/case-document/file/1127731/download>.

⁷ Complaint, *Lindsay v. Bridges Consulting, Inc.* No. 1:17-CV-03669-ELH (D. Md. Dec. 12, 2017), ECF 1

available at <https://www.justice.gov/crt/case-document/file/1025261/download>.

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