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Furlough or Leave of Absence Clause Revisited

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Q: In Law Review 41 (April 2002), you discussed USERRA's "furlough or leave of absence" clause [38 U.S.C. 4316(b)(1)]. You explained that, while away from the job performing uniformed service, an individual is entitled to continue receiving certain non-seniority benefits, if and to the extent that employees on some kind of non-military leave of absence receive such benefits. You also wrote, "[T]he most favorable treatment accorded to any particular form of [non-military] leave must also be accorded to the military leave, regardless of whether the non-military leave is paid or unpaid."

My employer insists that the comparison can only be made with other forms of unpaid leave, and the employer is denying me several important benefits as a result of this interpretation. Please elaborate.

A: USERRA's "furlough or leave of absence" clause reads 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—(A) deemed to be on furlough or leave of absence while performing such service; and (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees 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." [38 U.S.C. 4316(b)(1).] Essentially identical language appeared in the Veterans' Reemployment Rights (VRR) law, which USERRA replaced in 1994.

The leading VRR case on the "furlough or leave of absence" clause is Waltermyer v. Aluminum Company of America, 804 F.2d 821 (3rd Cir. 1986). In that case, the comparison was to jury leave, a form of paid leave. USERRA's legislative history clearly indicates that Congress intended to adopt and reaffirm Waltermyer: "The Committee [House Committee on Veterans' Affairs] intends to affirm the decision in Waltermyer … that, to the extent 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 the military leave, regardless of whether the non-military leave is paid or unpaid." House Report No. 103-65, 1994 U.S. Code Congressional and Administrative News 2449, 2466-67 [emphasis supplied].

Q: An attorney in the employer's Legal Department has contended that the comparison can only be made to other forms of unpaid leave, because of the doctrine of "ejusdem generis." What is "ejusdem generis?" Is there any validity to this attorney's assertion?

A: The doctrine of ejusdem generis has been defined as follows: "Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the 'ejusdem generis rule' is that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.… The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically mentioned. Nor does it apply when the context manifests a contrary intention." Black's Law Dictionary, 5th edition, page 464 [emphasis supplied, internal citations omitted].

I recognize the validity of the doctrine of ejusdem generis. In this case, however, I believe that USERRA's legislative history and the Waltermyer precedent overcome the doctrine.
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