

**Number 59, December 2002:
Vacation Benefits Under USERRA**

By CAPT Samuel F. Wright, JAGC, USNR*

Q: Do I continue accruing vacation days while I am away from my civilian job performing service in the uniformed services?

A: Probably not, because vacation days do not qualify as "perquisites of seniority." The pertinent USERRA provision is as follows: "A person who is re-employed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." [38 U.S.C. 4316(a).] This provision codifies the "escalator principle" first enunciated by the Supreme Court in its first case under the Veterans' Reemployment Rights (VRR) law, which was replaced by USERRA in 1994. The Supreme Court held, "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

The escalator principle applies to perquisites of seniority. A two-part test determines whether a particular benefit qualifies as a perquisite of seniority: (a) The benefit must be intended to be a reward for length of service, not a form of short-term compensation; and (b) It must be reasonably certain that the veteran would have attained the benefit if he or she had remained continuously employed. A vacation day is deemed to be a form of short-term compensation, not a reward for length of service. Thus, the escalator principle does not entitle the returning veteran to the vacation days that he or she would have earned if continuously employed. See *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

On the other hand, you can claim the accrual of vacation days under USERRA's "furlough or leave of absence" clause, if and to the extent that employees on some form of non-military leave of absence continue accruing vacation days. [See Law Reviews 41 and 58.]

Q: What about the rate of accrual of vacation days? At my place of employment, new employees with less than a year of seniority earn no vacation. Employees with one to three years of seniority earn one week of vacation per year. Employees with three to 10 years of seniority earn two weeks of vacation per year. Employees with more than ten years of seniority earn three weeks of vacation per year.

A: In a system like that you describe, the rate at which you earn vacation, after you return from service, clearly qualifies as a perquisite of seniority to

which you are entitled upon return from service, assuming that you meet USERRA's eligibility criteria. [See Law Reviews 4-7 for the eligibility criteria.] Let us assume that you went to work for this company in January 2001. You meet the one-year threshold in January 2002, the three-year threshold in January 2004, and the ten-year threshold in January 2011. Your military-related absence does not interrupt your continued accrual of seniority for this purpose.

Q: In Law Review 26 (June 2001), you discussed 38 U.S.C. 4316(d), which permits, but does not require, me to use, during a period of uniformed service, vacation days that I have accrued prior to that period of service. I was recalled to active duty in September 2001. The employer "burned up" my vacation days in order to keep me on the payroll until 30 September 2001, when the employer changed my status to "unpaid military leave." The employer did not consult me as to whether I wanted to use my vacation days in this way. I would have preferred to conserve my vacation days for later use, after my return from service (September 2002). Now (Christmas 2002), I am being told that I cannot take a week off because I do not have sufficient vacation in the bank. All my vacation days were utilized in September 2001, and I did not accrue any additional vacation days during the year that I was on active duty. Have my USERRA rights been violated?

A: The pertinent USERRA section reads as follows: "Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request by 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." [38 U.S.C. 4316(d), emphasis supplied].

The second sentence of this subsection, italicized above, was added by section 311(d)(6) of the Veterans Benefits Improvement Act of 1996, Public Law No. 104-275, 110 Stat. 3322, 3335 (enacted 9 October 1996). The rationale for this 1996 amendment has been explained as follows: "Section 4316(d) of title 38, United States Code, expressly allows the service member to choose to use vacation, annual, or similar leave with pay while on military leave. This provision is intended to preclude an employer from forcing a service member to use leave, paid or unpaid, against his or her will. Notwithstanding this intent, as shown in the legislative history of section 4316(d), see H. R. 103-65 at 35, it has come to the Committee's [Senate Committee on Veterans' Affairs] attention that questions have arisen concerning this provision. Indeed, the Committee has learned that some employers are reportedly attempting to require that service members use vacation leave while in service when to do so is not pursuant to the service member's request. The Committee bill would clarify that it is a violation of section 4316(d) for an employer to require a service member to use paid or unpaid vacation, annual, or similar leave when the use of such leave is not requested by the service member." [Senate Report No. 104-371, 1996]

United States Code Congressional and Administrative News 3762, 3780-81.]

Thus, it is clear that the employer violated your USERRA rights by requiring you to utilize your accrued vacation in September 2001. Of course, you cannot simultaneously "eat" your vacation days and have them too. If you want those vacation days restored, you will probably be required to repay the employer for the salary incorrectly paid to you in September 2001.

Note: Through the good offices of the National Committee for Employer Support of the Guard and Reserve, this issue was recently resolved. The employer agreed to restore the vacation days erroneously "burned up" in September 2001, and the Reservist will have the opportunity to take a week off from work to visit his aged parents at Christmas 2002. This gives his parents the opportunity to welcome him home from Afghanistan and also to meet their first grandson, born during this Reservist's active-duty period.

* Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.