

**Number 79, June 2003:**

**Right to Re-employment with Successor in Interest to Pre-Service Employer and Status of Re-employed Veteran**

By CAPT Samuel F. Wright, JAGC, USNR\*

**Q: I was recalled to active duty for one year, from October 2001 to October 2002. When called, I was employed on an Army base as an employee of ABC Corp., providing base operating support (BOS) to the base commander. I gave proper notice to ABC and was told that my job would be there when I came back.**

In August 2002, while I was on active duty, the Army's contract with ABC expired, and the Army awarded the new contract to XYZ Corp. Just about all the ABC employees at the base were hired by XYZ, and they are now doing essentially the same jobs as before, but with a new company name on their paychecks. Do I have re-employment rights with XYZ?

A: Yes, because it is reasonably clear that, at least as to the BOS contract at that base, XYZ is the successor in interest to ABC. Legislative history for the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides as follows on this issue: "This provision [USERRA's definition of "employer"] would also have the effect of placing liability on a successor in interest, as is true under current law. The Committee [House Committee on Veterans Affairs] intends that the multifactor analysis utilized by the court in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991) is to be the model for successor in interest issues, except that the successor's notice or awareness of a re-employment rights claim at the time of merger or acquisition should not be a factor in this analysis. In actual practice, it is possible that the successor would not have notice that one or more employees are absent from employment because of military responsibilities and a returning serviceperson should not be penalized because of that lack of notice." H.R. Rep. No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2454.

**Q: After contacting you by e-mail, I took your advice and made a formal written application for re-employment with XYZ, by certified mail, well within the 90 days permitted by law. (I also sent a similar letter to ABC, just to be on the safe side.) XYZ grudgingly acknowledged that as ABC's successor it has obligations to me, but I am not satisfied with the job that XYZ has offered to me. Does USERRA entitle me to the specific job I left?**

**At the time I was called to active duty, my title at ABC was "director of safety and environmental compliance (S&EC)." ABC hired a woman to take my place, telling her that her job was temporary, until I returned from active duty. She was well qualified and did a good job. I think that I am entitled to the job that she is holding because I**

**would almost certainly be in that job today if I had not been called to active duty.**

**XYZ has hired me as its “motor pool director.” Although that job normally pays only 70 percent of what the S&EC director job pays, XYZ has raised my pay to equal that. Although the pay is the same, my new job does not enhance my career and is not as professionally satisfying as the job I left to go on active duty. My advanced education and specialized skills that I formerly used are going to waste in my new job as the glorified clerk of the motor pool. I think that it is unfair that my career is now in a rut because I served my country when called.**

A: Because your period of service was for more than 90 days, the employer is required to re-employ you “in the position of employment in which the person [you] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.” 38 U.S.C. 4313(a)(2)(A) [emphasis supplied]. The question thus becomes whether the motor pool job is of like “status” to the safety and environment job. I think that it is clear that your new job is not of like status and is not a sufficient compliance with USERRA.

The word “status” was also used in the Veterans’ Reemployment Rights law, which was in effect before USERRA was enacted in 1994. USERRA’s legislative history provides as follows concerning the meaning of that word: “Although not the subject of frequent court decisions, courts have construed status to include ‘opportunities for advancement, general working conditions, job location, shift assignment, and rank and responsibility.’ Monday v. Adams Packing Assoc., Inc., 85 LRRM 2341, 2343 (M.D. Fla. 1973). See Hackett v. State of Minnesota, 120 Labor Cases (CCH) paragraph 11,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of like status. See Armstrong v. Cleaner Services, Inc., 79 LRRM 2921, 2923 (M.D. Tenn. 1972), as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation.” H.R. Rep. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2464 [emphasis supplied].

I think that the fact that XYZ raised the salary of the motor pool job to equal that of the safety and environment job is good evidence that the two jobs are not of like status. See Ryan v. Rush-Presbyterian-St. Luke’s Medical Center, 15 F.3d 697, 699 (7th Cir. 1994).

The fact that you were not immediately available to start work at the time XYZ took over from ABC in no way defeats your re-employment rights. See Beattie v. Trump Shuttle, Inc., 758 F. Supp. 30 (D.D.C. 1991). Your right to re-employment is not contingent upon the existence of a vacancy. The filling of the job and the employer’s satisfaction with the replacement do not defeat

your re-employment rights. See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992); Goggin v. Lincoln St. Louis, 702 F.2d 698, 703-04 (8th Cir. 1983). (Additional cases on this point are cited in Law Review 8.) I think that you have a strong case. Good luck. ROA

\* 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.