

LAW REVIEW 808

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CATEGORY: 1.14—Status of Returning Vet

The Meaning in Shift: Daytime work is part of the “status” to which the returning veteran is entitled.

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

Q: I was called to active duty with the Marine Corps Reserve some months ago, and now I am about to be released from active duty. I have met each of the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA) that you describe in Law Review 77. I am now home on terminal leave, and I am in conversations with the personnel manager at work about the details of my reemployment. I expect to return to work next week, immediately after I leave active duty.

At the company where I work, there are two shifts. The first shift runs from 8 a.m. to 4 p.m., and the second shift from 4 p.m. to midnight. When things get really busy, a third shift (midnight to 8 a.m.) is added. I had always worked the first shift during the five years that I have worked for this company. The second shift pays 10 percent more, but I just don’t want to work at night, if I can avoid it. Most of my colleagues at work feel the same way.

The personnel manager told me that another employee, who works on the second shift, is about to go on maternity leave and when I return to work I will be put in her second shift slot, probably permanently. I protested that I have always worked the day shift and there is no reason to believe I would have been transferred to the night shift if I had not been called to active duty. The personnel manager told me I should consider myself lucky to have a job at all, and that I should not complain about having to work at night.

A: Contrary to the personnel manager’s apparent impression, compliance with USERRA is not optional. If you meet the USERRA eligibility criteria, and it seems clear that you meet them, the employer is required to reemploy 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). I think that it is clear that a night shift job is not of like status to a day shift job, even with a 10 percent pay differential for working at night.

USERRA does not define the word “status,” but the same word was used in the reemployment statute prior to the 1994 enactment of USERRA, and USERRA’s legislative history mentions this issue: “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 Association Inc.*, 85 LRRM 2341, 2343 (M.D. Fla. 1973). See *Hackett v. State of Minnesota*, 120 Labor Cases (CCH) Par. 11,050 (D. Minn. 1991).” House Report No. 103-85, 1994 *United States Code Congressional & Administrative News* 2449, 2464 (emphasis supplied). The Department of Labor USERRA Regulations also mention “shift assignment” as being part of the “status” to which the returning veteran is entitled. 20 C.F.R. 1002.193(a). I also invite your attention to Law Review 191, available at www.roa.org/law_review.