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Fourth Supreme Court Case Relating to Reemployment Statute *Oakley v. Louisville & Nashville Railroad Co.,* 338 U.S. 278 (1949)

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1.3.2.2—Continuous Accumulation of Seniority—Escalator Principal
1.3.2.12—Special Protection Against Discharge, Except Cause
10.1—Supreme Court Case on Reemployment

In this case, the Supreme Court reviewed two separate but similar Court of Appeals cases involving the rights of returning veterans under the reemployment statute, which was enacted in 1940.

In the first case, Mr. Oakley (first name not provided in either the Supreme Court or the Court of Appeals decisions) was employed as a locomotive machinist for the Louisville & Nashville Railroad Co. (L&N) at its shop in Loyall, Ky., when he was drafted on May 7, 1944. He was honorably discharged on May 22, 1946, and he returned to work at L&N in July 1946.

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

In July 1945, while Mr. Oakley was on active duty, the Loyall shop was transferred to Corbin, Ky. The transferred employees received "Corbin seniority" as of July 1, 1945. When Mr. Oakley returned to work a year later, he was given a Corbin seniority date of July 1946, rather than July 1945. As a result, he suffered certain disadvantages in the selection of work hours and a greater chance of being laid off, because layoffs were based on seniority at the employee's present work location.

Because L&N refused to adjust Mr. Oakley's seniority, he filed suit against the company on April 14, 1947, in the U.S. District Court for the Eastern District of Kentucky. The Railway Employees Department of the American Federation of Labor intervened in the case as a defendant and filed a motion to dismiss. The District Court granted the motion to dismiss, because Mr. Oakley's one year of special protection against discharge, except for cause, had expired. The court relied on *Trailmobile v. Whirls,* 331 U.S. 40 (1947). The U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal. *Oakley v. Louisville & Nashville Railroad Co.,* 170 F.2d 1008 (6th Cir. 1948).

In the second case, John S. Haynes was employed as a machinist helper for the Cincinnati, New Orleans & Texas Pacific Railway (CNOTP) at the time he enlisted in the Armed Forces on Feb. 1, 1942. He was honorably discharged in November 1945 and returned to work shortly thereafter.

While Mr. Haynes was on active duty, six machinist helpers who were junior to Mr. Haynes in seniority were promoted to the rank of machinist apprentice. Mr. Haynes contended that he was entitled to that promotion, and the concomitant increase in pay, under the "escalator principle" enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).

Mr. Haynes sued CNOTP, also in the U.S. District Court for the Eastern District of Kentucky. As in *Oakley,* the District Court dismissed the case and the U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal. *Haynes v. Southern Railway System,* 171 F.2d 128 (6th Cir. 1948).

The Supreme Court granted *certiorari* (discretionary review) in both cases, because of the importance of the issue and the reemployment statute in the aftermath of World War II when millions of honorably discharged veterans sought to return to their civilian jobs. At the time the Supreme Court decided this case, section 8(c) of the Selective Training and Service Act read as follows: "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training or service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." *Oakley v. Louisville & Nashville Railroad Co.,* 338 U.S. 278, 283 n. 4.

If you compare this language with the current language of the Uniformed Services Employment and Reemployment Rights Act (USERRA), you will find a marked similarity. Specifically, the current language of the "special protection against discharge" provision is as follows: "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(c). I discuss section 4316(c) in detail in Law Reviews 184 and 0701.

In *Oakley,* the Supreme Court clarified its holding in *Trailmobile v. Whirls,* and the Court forcefully rejected the argument that the end of the period of special protection against discharge, except for cause, marks the end of the veteran's rights under the reemployment statute: "In the *Fishgold* case, we did not deal with the effect, if any, upon a veteran's seniority, of the expiration of his first year of reemployment. We there dealt with the initial terms of his restored position. We stated, in effect, that an honorably discharged veteran, covered by the statute, was entitled by the act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the armed forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment. *Fishgold v. Sullivan Corp.,* 328 U.S. 275, 284-285; see also, *Aeronautical Lodge v. Campbell,* 337 U.S. 521, 526. In the *Trailmobile* case, *supra,* at pages 56 and 60, we dealt with the one year of special statutory protection given to the veteran in his restored position. We said, in effect, that this provision protected him not only from the total loss of that position by 'discharge' from it 'without cause,' but that it also protected him, for one year, against the loss of certain other benefits incidental to his restored position.

"The instant cases take us one step further. In them we hold that the expiration of the year did not terminate the veteran's right to the seniority to which he was entitled by virtue of the act's treatment of him as though he had remained continuously in his civilian employment; nor did it open the door to discrimination against him, as a veteran. Section 8(c) of the act requires that the veteran shall be restored to his position 'without loss of seniority.' He therefore assumes, upon his reemployment, the seniority he would have had if he had remained in his civilian employment. His seniority status secured by this statutory wording continues beyond the first year of his reemployment, subject to the advantages and limitations applicable to the other employees.

"In the instant cases, the respective complaints stated, in effect, that the complainants therein had not been restored to the places to which they were entitled on the escalators of their respective civilian employments. In No. 28 [Oakley], the allegation was that the petitioner was entitled, by virtue of the status he would have enjoyed had he remained continuously in his civilian employment, to the seniority of a locomotive machinist at Corbin from July 1, 1945, rather than from July 17, 1946. If he were entitled to the higher rating upon his reemployment, the act did not deprive him of that rating merely by virtue of the expiration of his first year of

reemployment. The motion to dismiss this action because of the expiration of that year, accordingly, should have been denied.

In No. 29 *[Haynes],* we reach the same result. That result is not affected by the failure of the veteran, in this case, to file his complaint until nearly three months after the expiration of his first year of reemployment. The act did not establish a one-year statute of limitations upon the assertion of the veteran's initial rights of reemployment. It added special statutory protection, for one year, against certain types of discharges or demotions that might rob the veteran's reemployment of its substance, but the expiration of that year did not terminate the right of the veteran to the seniority to which he was, in the first instance, entitled by virtue of the act's treatment of him as though he had remained continuously in his civilian employment.

The judgment of the Court of Appeals in each case is therefore reversed and the respective causes are remanded for further proceedings not inconsistent with this opinion." *Oakley,* 338 U.S. at 283-85.

In 2008, as in 1949, the "special protection against discharge" provision is good news for the returning veteran, not bad news. As I explained in Law Review 184, the purpose of this provision is to protect the returning veteran from the bad faith or *pro forma* reinstatement, and to give the returning veteran a reasonable time to regain the skills required by the civilian job. If the employer fires or downgrades the reinstated veteran during the special protection period, the employer bears a heavy burden of proof. The end of the special protection period marks the end of this

heightened scrutiny, but it most definitely does not mark the end of the veteran's rights under the reemployment statute. It should also be noted that, under section 4311 of USERRA (38 U.S.C. 4311), persons who are members of or apply to become members of uniformed services, and persons who perform, have performed, apply to perform, or have an obligation to perform service in the uniformed services are not to be denied initial employment, retention in employment, or any promotion or benefit on the basis of any of these protected factors. The protection of section 4311 never expires. Assume that an employer denies a person employment in 2008 because the person had served in the Marine Corps in Vietnam in 1967—that denial would be a violation of section 4311. The broad and strong language of section 4311 can be traced back only to 1994, when Congress enacted it as part of the long-overdue recodification of the statute applied by the Supreme Court in *Oakley.*

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