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Vacation Days: A recent settlement casts a new light on vacation accrual for Reservists who take time off for military training or service.

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A?recent settlement between the U.S. Department of Justice (DOJ) and American Airlines restores the loss of vacation and sick leave benefits to those who serve in the Reserve Components. The decision means that Reservists working for the airline should continue to accrue vacation days and sick leave while they are away from work for military training or service.

In 2006, DOJ sued American Airlines on behalf of three named pilots and a class of 350 others who were not named. This was the first class-action suit ever brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA). DOJ asserted that American Airlines' treatment of pilots with respect to the accrual of vacation and sick leave during short tours of military training violated section 4316(b)(1) of USERRA.

On April 17, DOJ announced that it had reached a settlement with American Airlines. The 353 pilots will receive $345,772 for loss of vacation and sick leave benefits, and American Airlines will restore sick leave credits, with an additional value of about $215,000. American Airlines also agreed to modify its policies and practices to come into compliance with USERRA.

In announcing the settlement, Attorney General Michael B. Mukasey said, "The sacrifices made by our armed forces, including military Reservists, are invaluable to our nation. No member of the military should be disadvantaged for choosing to serve our country and for answering the call of duty. The Department of Justice remains committed to protecting the employment rights of all Americans serving in the armed forces."

As I explained in Law Review 104 and other articles, USERRA was enacted in 1994 as a complete recodification of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940, when it was enacted as part of the Selective Training and Service Act. In its first of 16 cases construing the VRRA, the Supreme Court enunciated the "escalator principle" when it 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 the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). Section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies the escalator principle in the current statute.

Several subsequent Supreme Court cases have elaborated on the escalator principle. It does *not* mean that upon return from military service you are entitled to all good things that might have happened to you if you had been continuously employed. When you return from military service and meet the USERRA eligibility criteria for reemployment (prior notice to the employer, not having exceeded the five-year limit, release from service under honorable conditions, and timely application for reemployment), you are entitled to the *perquisites of seniority* that you would have attained if you had been continuously employed in the civilian job instead of being away for service.

A two-part test determines whether a particular benefit qualifies as a perquisite of seniority that the returning veteran is entitled to claim upon reemployment. First, a perquisite of seniority is something that was intended to be a reward for length of service rather than a form of short-term compensation. Second, it must be reasonably certain (not necessarily absolutely certain) that the individual would have received the benefit if he or she had been continuously employed.

In 1975, the Supreme Court held that the accrual of vacation days does not qualify as a perquisite of seniority because it fails the first part of the test. *See Foster v. Dravo Corp.,* 420 U.S. 92 (1975). It is clear that the escalator principle does not entitle the returning veteran to the vacation days that he or she would have received if continuously employed.

Under some circumstances, the employee who is away from work for service in the uniformed services (whether a short period of military training or many months of active duty) is entitled to continue accruing vacation days from the civilian employer, under USERRA's "furlough or leave of absence" clause. "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).

Thus, if employees of an employer who are away from work for non-military reasons, such as family leave or jury leave, continue to accrue vacation and sick days while away from work, then under section 4316(b)(1), those employees are entitled to continue accruing vacation and sick leave while away from work for military training or service. It was on this basis that DOJ sued American Airlines.