LAW REVIEW[1]09007
February 2009

12th Supreme Court Case Relating to Reemployment Statute: *Foster v. Dravo Corp.,* 420 U.S. 92 (1975)

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1.3.2.2—Continuous Accumulation of Seniority—Escalator Principal
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Earl R. Foster was employed by the Dravo Corp. until March 6, 1967, when he was drafted into the Army. He was honorably discharged about 18 months later and returned to work on Oct. 2, 1968. He claimed that the reemployment statute's "escalator principle" entitled him to the vacation that he would have earned in 1967 and 1968 if he had been present for work for the entirety of both years, but the Supreme Court rejected his principal argument.

The Supreme Court enunciated the escalator principle in its first case construing the reemployment statute, 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

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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.

have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).

In subsequent cases, the Supreme Court has refined the escalator principle. It does not apply to all that might have happened to the veteran if he or she had remained continuously employed. The escalator principle applies to "perquisites of seniority." A two-pronged test determines whether a benefit qualifies as a perquisite of seniority. First, the benefit must be something that was intended to be a reward for length of service, rather than short-term compensation for services rendered (or in this case not rendered, because the veteran was away from work for service during the period involved). Second, it must be reasonably certain (not necessarily absolutely certain) that the veteran would have attained the benefit if he or she had been continuously employed.

The Supreme Court held that Mr. Foster's claim for full vacation benefits for 1967 and 1968 failed under the first prong of this two-pronged test. An employee earns vacation by working. Mr. Foster was not entitled to vacation based on months that he did not work for the civilian employer in 1967 and 1968.

Foster is different from *Eagar v. Magma Copper Co.,* 389 U.S. 323 (1967) (the 11th Supreme Court reemployment rights case; see Law Review 0903) in an important respect. In *Eagar,* the employee worked all but a few days of the employment year before his entry onto active duty. In *Foster,* on the other hand, the employee worked only a small part of the two years in question. Because Mr. Foster worked for the Dravo Corp. for only the first nine weeks of 1967 (before his induction) and for the last 13 weeks of 1968 (after his reemployment), he did not earn and was not entitled to claim the full vacation benefits that he would have earned if he had been present for work for the entirety of 1967 and 1968.

Mr. Foster's back-up argument was that he should receive, at a minimum, a *pro rata* share of his 1967 and 1968 vacation benefits, based on the nine weeks that he worked in early 1967 and the 13 weeks that he worked in late 1968. This back-up claim was based on the reemployment statute's "furlough or leave of absence" clause. (I discuss that provision in detail in Law Reviews 41, 58, and 158.) The Supreme Court remanded the case to give Mr. Foster the opportunity to provide evidence in support of his back-up argument.

On remand, Mr. Foster prevailed on his back-up argument. The District Court pointed out that the collective bargaining agreement between the union and the employer provided for *pro rata* vacation benefits for an employee who worked part but not all of a calendar year because of being laid off by the employer. A layoff is essentially the same thing as a furlough. Accordingly, Mr. Foster was entitled to a *pro rata* share of his 1967 and 1968 benefits—the cash equivalent came to all of $166.28, according to the District Court. *See Foster v. Dravo Corp.,* 395 F. Supp. 536 (W.D. Pa. 1975).**

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