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1.3.2.2.—Escalator Principle

1.3.2.10—Furlough or Leave of Absence Clause

Furlough or Leave of Absence Clause Revisited

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Tully v. Department of Justice, 481 F.3d 1367 (Fed. Cir. 2007). Mathew B. Tully was a corrections officer for the Federal Bureau of Prisons, which is part of the U.S. Department of Justice (DOJ). He was also a member of the New York Army National Guard, and he left his DOJ job to serve on active duty for 2.5 years, from October 1995 to April 1998. In accordance with standard policy for federal employees away from their jobs for lengthy periods of military service, DOJ put him on an unpaid military leave of absence for the period of time he was away from work.

After returning to work, Mr. Tully claimed that DOJ owed him his federal pay for the federal holidays that occurred during the 30 months that he was away from work for active duty. He pointed out that DOJ employees who were away from work for service as jurors or witnesses in court cases received holiday pay during these leaves of absence. He claimed the right to the same benefit under section 4316(b)(1) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which reads as follows: "(b) (1) 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).

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994 as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. You can find all previous Law Review articles (more than 500) at www.roa.org/law_review.

The VRRA's "furlough or leave of absence" clause was carried over into USERRA without significant change. USERRA's legislative history provides as follows concerning this provision: "Section 4315(b) [later renumbered 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with a promise of reemployment, is of no effect. *See Green v. Oktibbeha County Hospital*, 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders v. People Exp. Airlines Inc.*, 595 F. Supp. 1512, 1518 (D. N.J. 1984), *affirmed*, 770 F.2d 1078 (3d Cir. 1985). Accordingly, while away on military leave, the servicemember would be entitled to participate in whatever nonseniority- related benefits are accorded other employees on non-military leaves of absence. *See Winders, supra*. In contrast, benefits which are-seniority based would not be limited to the treatment accorded employees on non-military leaves of absence, but are to be accorded, after reemployment, as if the servicemember had remained continuously employed under the escalator principle. The Committee [House Committee on Veterans' Affairs] intends to affirm the decision in *Waltermeyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid.... However, servicemembers are not entitled to receive benefits beyond what they would have received had they remained continuously employed." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2466-67.

Federal employee USERRA claims are adjudicated by the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency. In accordance with standard MSPB practice, Mr. Tully's case was heard by an administrative judge (AJ) of the MSPB, who conducted a trial and made a decision based on the evidence produced by both sides at the trial.

Mr. Tully pointed out that DOJ employees on "court leave" received pay for federal holidays during the leave, and he claimed that section 4316(b) of USERRA entitled him to that same benefit. The AJ ruled against him, pointing out that court leaves typically last only a few days and are not comparable to Mr. Tully's 30-month military leave. Mr. Tully appealed to the MSPB itself, which consists of three members, each of whom is appointed by the president with Senate confirmation. The MSPB affirmed the AJ's decision, without writing a new decision.

Mr. Tully appealed to the U.S. Court of Appeals for the Federal Circuit, a specialized federal appellate court in Washington, D.C. The Federal Circuit has nationwide jurisdiction over certain kinds of cases, including appeals from final MSPB decisions. The Federal Circuit has a great track record for reversing the MSPB, in cases where the Board has failed to construe USERRA liberally for the benefit of those who lay aside their civilian jobs to serve our nation in the Armed Forces, as Congress intended and the Supreme Court has commanded. I invite the reader's attention to Law Reviews 189, 191, 0614, 0722, 0726, 0729, and 0752, by MAJ Mathew B. Tully and myself. Yes, it is the same Mathew B. Tully. But this time the Federal Circuit affirmed the MSPB decision.

In *Waltermeyer*, *supra*, the U.S. Court of Appeals for the Third Circuit held that the VRRA's "furlough or leave of absence" clause entitled employees of the Aluminum Company of America (Alcoa) to holiday pay for holidays during their military leave periods, because Alcoa employees on jury leave received such holiday pay. Mr. Tully claimed that, under this precedent, he should receive holiday pay for the federal holidays that occurred during his 30-month military leave. The MSPB and the Federal Circuit disagreed, pointing out that Mr. Tully's 30-month military leave was much longer than and therefore not comparable to the typical jury leave or court leave, which lasts only a few days. In *Waltermeyer*, the military leaves were for short tours of military training. This holding is in accord with the Department of Labor USERRA Regulations. See 20 Code of Federal Regulations 1002.150.

Beware of attempts by employer attorneys to read too much into this Federal Circuit precedent. This case deals *only* with section 4316(b) of USERRA, not section 4316(a) (the "escalator principle"). The "furlough or leave of absence clause" deals with *non-seniority benefits during the military leave*. The *escalator principle deals with seniority benefits after returning to work*. In the long term, the escalator principle is far more important.

In its first case 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 law.

To understand the distinction, let us take the hypothetical Joe Smith, employed by Employer ABC. Joe leaves his civilian job for a period of military service. Under section 4316(b), Joe is entitled to non-seniority benefits, during his period of service, like other ABC employees who are on non-military leaves of comparable duration. Under section 4316(a), Joe is entitled to seniority benefits after he returns to work, as if he had been continuously employed.

I invite the reader's attention to Category 1.3.2.2 in the Law Review Subject Index for 15 articles (plus now this article) about USERRA's escalator principle. Category 1.3.2.10 contains five articles (plus one, with this article) about the furlough or leave of absence clause.