

LAW REVIEW 933

(SEPTEMBER 2009)

CATEGORY: 1.3.2.2—Continuous Accumulation of Seniority Escalator Principle

1.3.25—Rate of Pay after Reinstatement

1.8—Relationship between USERRA and Other Laws/Policies

Promotion and Pay Raise Delayed by Military Service--Am I Entitled to Back Pay?

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

Q: I read and use your Law Review articles, and my situation is similar to the situation you address in Law Review 53 (October 2002), but I do not see a clear answer to my question.

A large private employer hired me in July 2005. There is a two-year apprenticeship program, and the requirement is real, not just a passage-of-time requirement. A new employee must learn many things about how to do the job safely and efficiently and must demonstrate that he or she has learned these things, before being promoted to the journeyman level with a substantial pay increase. Of the ten new employees hired in July 2005, seven were promoted to journeyman in July 2007; two failed to learn and were dismissed in July 2007; I was the tenth employee. I am a member of the Army Reserve, and I was called to active duty for a year, from January 2007 until January 2008. I returned to work in January 2008 and picked up where I had left off in the apprenticeship program. I completed the program in July 2008, a year after my contemporaries, because my employment by the company was interrupted by a year of military service.

I provided the employer and the union a copy of your Law Review 53, and I demanded that my seniority date as a journeyman be backdated from July 2008 (when I completed the apprenticeship program) to July 2007 (when I would have completed it but for the military service). I also demanded that the company pay me the difference in pay between July 2007 and July 2008.

The company agreed to backdate my seniority date, if the union went along, but the union objected. The company rejected my demand for back pay. The company insists that an employee is not entitled to the higher journeyman pay rate until the employee completes the apprenticeship program, and that therefore I was not entitled to the higher pay rate until July 2008. What do you think?

A: As I explained in Law Review 53, you are clearly entitled to have your seniority date as a journeyman backdated to the date that you would have completed the apprenticeship program but for the interruption caused by your call to the colors. I invite your attention to *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265 (1958) and *Diehl v. Lehigh Valley Railroad Co.*, 348 U.S. 960 (1950). I invite your attention to Law Review 0842 for a detailed discussion of *McKinney* and Law Review 0834 for a detailed discussion of *Diehl*. The Law Review column includes a case note on each of the 16 Supreme Court cases on the reemployment statute. You can find all of the past Law Review articles at www.roa.org/law_review. If your seniority date as a journeyman is backdated to July 2007, you will have seniority that is equal to that of your seven contemporaries who were hired in July 2005 along with you. That will affect when you are eligible for your next promotion. It can also make a big difference if the economic downturn leads to layoffs, which are based on seniority in a unionized company like yours. A layoff that reaches back to January 2008 journeyman dates will affect you if your journeyman date is July 2008, but not if your journeyman date is July 2007.

In its first case construing the 1940 reemployment statute, the Supreme Court held: "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service to his country an advantage which the law withheld from those who stayed behind." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946). I invite your attention to Law Review 0803 for a detailed discussion of the seminal *Fishgold* case. *Fishgold* also states: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold*, 328 U.S. at 285. Contrary to the apparent belief of your employer and your union, the union does not

have the right to veto the employer's compliance with USERRA. *See also* 38 U.S.C. 4302(b). Now let's turn to the issue of the retroactive pay increase. When I wrote Law Review 53 (published October 2002), I did not have access to the Department of Labor (DOL) USERRA Regulations, which were published three years later. As I explained in Law Review 0604 (Feb. 2006), section 4331 of USERRA gives the secretary of labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* on Sept. 20, 2004. After receiving and considering comments, DOL published the final regulations on Dec. 19, 2005, and the regulations went into effect on Jan. 18, 2006. The USERRA Regulations are published in Title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002).

The regulations provide that the employer is required to give the returning veteran the rate of pay (upon reemployment in the civilian job) that he or she would have attained if he or she had remained continuously employed. "Any pay adjustment must be made effective as of the date it would have occurred had the employee's employment not been interrupted by uniformed service." 20 C.F.R. 1002.236(a). Applying this rule to your situation, I believe that the employer owes you for the difference in pay between January and July 2008, after you returned to work. Once you completed the apprenticeship program in July 2008, the employer was required to pay you the difference in pay between January and July.

Q: While I was on active duty, from January 2007 until January 2008, the employer paid me differential pay, representing the difference between my civilian pay and my Army pay while I was on active duty. If I had not been called to active duty in January 2007, I would have received a substantial pay raise in July 2007. I think that the company owes me money for the period between July 2007 (when I would have received the pay raise) and January 2008 (when I left active duty and returned to work). I think that I am entitled to a bump in my differential pay for that period of time. What do you think?

A: USERRA does not require civilian employers to pay differential pay. Differential pay is a matter of grace and not of right, so I do not think that your claim for a bump in the differential pay is valid.