LAW REVIEW 954

1.3.2.2-Continuous Accumulation of Seniority-Escalator Principle
1.3.2.10-Furlough or Leave of Absence Clause

Military Service Is Not "Just Like Maternity Leave."

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

Q: I was hired in March 2007 and started a formal training program. Completing the training program normally takes two years, and all but one of those who started with me completed the training program in March 2009. Upon completing the training program, a new employee becomes a "journeyman." The date of attaining journeyman status is very important, because it controls when the employee is eligible to compete for the next promotion. Also, if economic conditions result in a reduction in force, the layoffs are done in seniority order, based on the date of attaining journeyman status. Thus, having a July 2009 journeyman date rather than a March 2009 journeyman means that I am much more likely to be laid off.

During my training program, I was called to active duty in the Air Force Reserve for four months. As a result, I completed the training program in July 2009 rather than March 2009. Now, I am four months behind my colleagues who started with me in March 2007. It is not fair. I was told that under the Uniformed Services Employment and Reemployment Rights Act (USERRA) I am to be treated *as if I had been continuously employed* for seniority purposes after I return to work.

I referred my employer's personnel director to your "Law Review" articles (especially Law Review 53) and contended that my seniority date should be backdated from July to March, so that I will not be behind the other new employees hired in March 2007. The personnel director told me that USERRA does not require the company to make this retroactive adjustment to my journeyman seniority date, because the company does not make such adjustments for other new employees who are absent from work during the training period for other reasons.

The personnel director insists that being away from work for military duty is "just like maternity leave." One of the other employees who started with me in March 2007 missed some time during the training program when she gave birth to her first child. After she returned to work, she completed the training program a few weeks after the other new employees hired in March 2007. The personnel director insists that because that other employee's journeyman seniority date was not adjusted after she completed the training program, the employer is not required to adjust my journeyman seniority date. Is the personnel director correct?

A: No. The personnel director is confusing the "furlough or leave of absence" clause with the "escalator principle." This is a very common and important misconception. I am writing this new article because I continue to hear this confusion among folks.

USERRA's "escalator principle" is as follows: "A person who is *reemployed* under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services *plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed*." 38 U.S.C. 4316(a) (emphasis supplied).

The Family and Medical Leave Act (FMLA) is different in this respect. The FMLA gives certain employees of covered employers the right to up to 12 weeks of unpaid leave for the birth or adoption of a child or for the employee's serious health condition or the employee's need to be away from work to care for a spouse, parent, son, or daughter with a serious health condition. Upon returning from FMLA leave, the employee is entitled to be restored to the position he or she left or an equivalent position. Under the FMLA, the employee retains the seniority that he or she had before going on FMLA leave, but the FMLA does *not* provide for the accumulation of additional seniority while away from work for FMLA leave. *See* 29 C.F.R. 825.214.

USERRA's "furlough or leave of absence" clause is as follows:

"(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)(1) (emphasis supplied).

Section 4316(b)(1) deals with your right to *non-seniority* rights and benefits (like the right to the employee discount when you shop at one of the company's stores) *while you are away from work for military service*. Section 4316(a) deals with your right to *seniority benefits after you return to work following your military service*. This is a very important distinction.

In your case, you are claiming a seniority benefit after you have returned to work, not a non-seniority benefit while you were away from work. Thus, section 4316(a) and not section 4316(b) controls the disposition of your case. The fact that another employee who was away from work during the training period for maternity leave did not receive a retroactive seniority adjustment after she completed the training program is irrelevant.

In determining your rights under section 4316(a), the relevant question is what would have happened to your job *if you had remained continuously employed* during the time that you were away from work for military service? The comparison should be to the other employees who were hired in March 2007 and who remained continuously employed.

You are entitled to the retroactive seniority adjustment of your journeyman date because it is *reasonably certain* (It need not be absolutely certain.) that you would have completed the training program in March 2009 rather than July 2009 if you had not been called to the colors for four months during the training period. The reasonable certainty is shown by two facts. First, the other employees who were hired in March 2007 completed the training program in March 2009 (except for the one employee who was out for maternity leave during part of the training program). Second, you were out on military duty for four months, and you completed the training program four months after your colleagues who remained continuously employed.

Congress first enacted the reemployment statute in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men (including my late father) for World War II. In 1941, as part of the Service Extension Act, Congress amended the STSA's reemployment provision to make it apply to voluntary enlistees as well as draftees.

The reemployment statute had several different formal names, but it came to be known colloquially as the Veterans Reemployment Rights Act (VRRA). The VRRA served our nation reasonably well for more than half a century, but by the 1980s numerous piecemeal amendments and changing circumstances had rendered some of the law's provisions confusing and outdated. In 1994, Congress enacted USERRA as a long-overdue recodification of the VRRA.

For a comprehensive history of the reemployment statute, I invite the readers' attention to Law Review 104 (Dec. 2003), entitled "Everything You Always Wanted To Know About USERRA But Were Afraid To Ask." You can find more than 600 past articles at www.roa.org/law_review. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics.

There have been 16 Supreme Court cases under the VRRA, the first in 1946 and the last in 1991. I invite the readers' attention to Category 10.1 in the Subject Index. You will find a case note about each of these 16 cases. The seminal Supreme Court reemployment case is *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946). I discuss that case and its implications in detail in Law Review 0803 (Jan. 2008).

In *Fishgold,* 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,* 328 U.S. at 284-85. Subsequent Supreme Court decisions have elaborated upon the escalator principle, and section 4316(a) codifies it in the current law.

USERRA's legislative history makes clear that the VRRA case law is to be applied in construing similar provisions of the new law: "The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Veterans' Affairs Committee] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle that the Act is to be 'liberally construed.' *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.

A United States Supreme Court case directly supports your claim to a retroactive seniority adjustment. "A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period. *But upon satisfactorily working that period, as petitioners did here, he can insist upon a seniority date reflecting the delay caused by military service*. Any lesser protection would deny him the benefit of the salutary provisions of sections 9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act." *Tilton v. Missouri Pacific Railroad Co.,* 376 U.S. 169, 181 (1964) (emphasis supplied).

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor published the final USERRA regulations in the *Federal Register* on Dec. 19, 2005, and the regulations were later codified in the *Code of Federal Regulations* (CFR), at 20 CFR Part 1002. These regulations strongly support the argument that the relevant comparison in cases like this is to what *would have happened to the returning veteran* if he or she had remained continuously employed. I invite the readers' attention to 20 C.F.R. 1002.210 through 1002.213.