LAW REVIEW 1015

Escalator Principle Applies to Entire Period of Military-Related Absence

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

Q: Joe Smith was hired by our state government on June 1, 2008. He was called to active duty and deployed to Afghanistan in Nov. 2008. His last day at work was Nov. 4, and he reported for mobilization on Nov. 10. He was released from active duty Dec. 15, 2009. He applied for reemployment with the state government onJan. 29, 2010 (45 days later) and returned to work on Feb. 1. He was involved in heavy combat inAfghanistan, and he needed 45 days to readjust to civilian life and get reacquainted with his family.

The personnel department of this state agency grudgingly acknowledges that Mr. Smith is entitled to seniority credit for the time that he was actually on active duty, but they have denied him seniority credit for the 45 days between his release from active duty and his application for reemployment. The personnel department adjusted his hire date from June 1, 2008 to July 15, 2008.

Is the personnel department correct that the member is not entitled to seniority credit for the 45 days?

A: No. The personnel department is wrong.

Congress enacted the reemployment statute in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. The reemployment statute had several formal names, but it came to be known colloquially as the Veterans' Reemployment Rights Act (VRRA). In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), a long-overdue recodification of the VRRA. USERRA is codified in title 38, United States Code, sections 4301-4335.

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 codifies the escalator principle in the current law: "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 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).

It is clear that Mr. Smith was entitled to reemployment in early 2010, because he met the five eligibility criteria under USERRA:

1. He held a position of civilian employment and left that position for the purpose of performing service in the uniformed services.
2. He gave the employer prior oral or written notice.
3. He has not exceeded the cumulative five-year limit with respect to the state government as his employer. Because the 2008-09 period of service was involuntary, it does not count toward his five-year limit. Please see Law Review 201 and www.roa.org/law_review.
4. He was released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. He made a timely application for reemployment with his pre-service employer.

After a period of service of more than 180 days, the returning veteran has 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). Mr. Smith made his application well within that deadline.

Section 4316(a) provides that the returning veteran "upon reemployment under this chapter" is entitled to seniority credit for the time he was away from work for uniformed service. Mr. Smith was reemployed on Feb. 1, 2010. He is entitled to be treated as if he had been continuously employed by the state during the entire time that he was away from work for service (Nov. 4, 2008 until Feb. 1, 2010). There is no lawful basis for limiting the seniority credit to his actual active duty time (Nov. 10, 2008 through Dec. 15, 2009).

I believe that section 4316(a) is clear on its face, but to the extent that there is any ambiguity in the statutory language, that ambiguity is clarified by the legislative history. The everyday work of courts includes determining the meaning of the words enacted by Congress or a state legislature—a process called "statutory construction." If the meaning of the enacted words is ambiguous, courts look to the legislative history, such as congressional committee reports.

When a significant new federal law is enacted, the legislative history is published in a series of books called *United States Code Congressional & Administrative News (USCCAN).* I invite the reader's attention to the 1994 edition of*USCCAN,* starting at page 2449. You will find 67 pages of legislative history—reprints of substantial segments of House Report No. 103-65 (House Committee on Veterans' Affairs) and Senate Report No. 103-158 (Senate Committee on Veterans' Affairs). A good law library (like at a law school) will have a copy of *USCCAN.*

Read page 2466 of the 1994 *USCCAN*, where the House Committee on Veterans' Affairs wrote, "Section 4315(a) [later renumbered 4316(a)] would recodify the 'escalator' principle as it applies to seniority and all rights and benefits which flow from seniority, calculated as if the person had never left employment. For example, in determining how much vacation (length of vacation) a servicemember is entitled to in the years following reinstatement, all time away from work (*period between leaving job and entering military service, period of military service, and period between discharge or release from military service and reemployment)* would be required to be considered under this section, together with the pre-military service period of employment." (Emphasis supplied.)

In *Fishgold* and several subsequent cases, the Supreme Court has held that the reemployment statute is to be "liberally construed for the benefit of he who laid aside his civilian pursuits to serve his country in its hour of great need." *Fishgold,* 328 U.S. at 285; *accord, Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977). USERRA's legislative history makes clear the intent of Congress that this "liberal construction" mandate also applies under USERRA. 1994 *USCCAN*at 2452. Denying Mr. Smith seniority credit for the 45 days between his release from active duty and his application for reemployment is inconsistent with the "liberally construe" mandate.

Thus, it is clear that the state agency violated USERRA when it changed Mr. Smith's recorded "hire date" from June 1, 2008 to July 15, 2008. Even if Mr. Smith survives the likely 2010 RIF, the seniority adjustment will likely hurt him in other ways, such as delaying his eligibility for promotion in the state agency. If Mr. Smith remains with the state government for his entire career, this unlawful hire date adjustment could delay his eligibility to retire or reduce the amount of his monthly retirement check.

Q: The union has objected to giving Mr. Smith seniority credit for any of the time he was away from work for service, and the union claims that giving him this credit violates the collective bargaining agreement between the union and the state. This state agency hired 11 new employees between June 2, 2008 and July 14, 2008. Between June 2, 2008 and Feb. 1, 2010 (the date of Mr. Smith's reemployment), the agency hired more than 600 new employees. The union contends that all 600 of those employees should go ahead of Mr. Smith on the seniority roster, thus guaranteeing that Mr. Smith will be affected by the likely RIF. Is the union's argument valid?

A: No. In its first case construing the reemployment statute, the Supreme Court held, "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. This principle is codified in section 4302(b) of USERRA: "This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice or other matter that reduces, limits, or eliminates in any manner

any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the enjoyment of any such benefit." 38 U.S.C. 4302(b).

Joe Smith has rights under USERRA and the 600 employees hired after him do not. In its first case construing the 1940 reemployment statute, the Supreme Court held, "The act was designed to protect the veteran in several ways. 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,* 328 U.S. at 284 (emphasis supplied).

There have been 16 Supreme Court cases construing the VRRA, between 1946 and 1991. You can find a case note about each case at www.roa.org/law_review. (See Category 10.1 in the Subject Index.) In six of those 16 cases, the union intervened as a defendant, seeking to prevent the employer from accommodating the rights of the returning veteran. The union is not necessarily the friend of the veteran, but the union does not have the right to stand in the way of the employer complying with its obligations under the reemployment statute.

Q: The state contends that giving Mr. Smith seniority credit for his military service time violates state law and the state constitution. Does that matter?

A: No. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." United States Constitution, Article VI, Clause 2.

This is commonly called the "Supremacy Clause." Under this clause, the federal reemployment statute trumps conflicting state laws. [*See Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1073-74 (5th Cir. 1979); *Cronin v. Police Department of the City of New York*, 675 F. Supp. 847, 853 (S.D.N.Y. 1987); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 1011, 1014-15 (E.D. Mich. 1985), *affirmed,* 802 F.2d 457 (6th Cir. 1986); *Mazak v. Florida Department of Administration*, 113 LRRM 3217 (N.D. Fla. 1983).]

Q: The state contends that, under the 11th Amendment to the United States Constitution, Mr. Smith cannot sue the state to enforce his USERRA rights. Is that correct?

A: In 1998, Congress addressed the 11th Amendment problem by amending USERRA to provide that USERRA lawsuits against state government employers are to be brought by the United States Attorney General, in the name of the United States, as plaintiff. The Attorney General sued Alabama for violating USERRA, and the court rejected Alabama's sovereign immunity and 11th Amendment defenses. Please see Law Review 1014 at www.roa.org/law_review.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.