

# LAW REVIEW 1042

## New Case on Successor in Interest under USERRA

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

### 1.1.1.9—USERRA Applicability to Successor in Interest

***Reynolds v. RehabCare Group East, Inc.*, 591 F.3d 1030 (8th Cir. 2010).**

A person who leaves a civilian job for voluntary or involuntary service in the uniformed services, and who meets the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA), must be reemployed after release from service and must be treated as if he or she had been continuously employed during the period of service. In some cases, the returning service member finds that the pre-service employer no longer exists, at least at the same location. If the new employer at that location is the “successor in interest” to the pre-service employer, the successor inherits from the predecessor the obligation to reemploy the returning veteran, but just being located at the same location is not enough to make the new employer the successor in interest.

Army Reserve Captain Pamela Reynolds (a life member of ROA) worked for Progressive Rehabilitation Associates (Progressive) from May 2004 until March 2006, when she left her job to enter active duty in the Army. She remained on active duty until July 2007, when she left active duty and returned home to Iowa. Progressive had a contract with the Green Hills Retirement Community (Green Hills) under which Ms. Reynolds and other employees of Progressive provided rehabilitation services to Green Hills residents at the Green Hills facility.

In July 2007, just as Ms. Reynolds was returning from active duty, Progressive notified Green Hills that it was terminating its contractual relationship with the retirement community. Green Hills then entered into a new contractual relationship with Deerfield Retirement Community (Deerfield), which in turn entered into a subcontract with RehabCare Group East (RehabCare) to provide rehabilitation services at Green Hills. Significantly, RehabCare did not hire any of the former Progressive employees who had been providing rehabilitation services to Green Hills’ residents.

After she was released from active duty, Ms. Reynolds made a timely application for reemployment with Progressive, her pre-service employer. Progressive offered her reemployment at its office in Iowa City, Iowa, but Ms. Reynolds rejected the offer, apparently on the grounds that Iowa City was too far from her home. Ms. Reynolds then sent a letter to Progressive and to Mr. Rod Copple, the Executive Director of Green Hills, applying for reemployment at Green Hills and asserting that RehabCare was the successor in interest to Progressive. Mr. Copple forwarded the letter to RehabCare, which wrote to Ms. Reynolds and sent her an employment application form.

“Reynolds crossed out the word ‘Employment’ and wrote in ‘Re-employment/USERRA.’ A RehabCare representative informed Reynolds that, while RehabCare would like to employ Reynolds at the Green Hills facility, RehabCare did not believe USERRA was applicable to RehabCare for Reynolds. RehabCare was prepared to make an employment offer, but Reynolds declined to hear any offers. She later stated, ‘If they were not going to honor the USERRA law and reinstate me into my job that I had prior to leaving, I didn’t want to hear the offer.’” *Reynolds*, 591 F.3d at 1031-32.

I believe that Ms. Reynolds erred in refusing to hear RehabCare’s offer, based on her interpretation of USERRA. She had reemployment rights with Progressive, not with RehabCare. RehabCare did not meet the successor in interest elements set forth by the 8<sup>th</sup> Circuit in *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240-246-47 (8<sup>th</sup> Cir. 1991). I invite the reader’s attention to Law Review 1041 for a detailed discussion of *Leib* and its implications.

There is a common misconception about USERRA that the law entitles people to return to “the job I left” after uniformed service. In fact, section 4313(a)(2)(A) of USERRA entitles reemployment in “the position of employment in which the person *would have been employed* if the continuous employment of such person

with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform.” 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

It seems clear that the position that Ms. Reynolds *would have* occupied in July 2007, but for her entry on active duty in March 2006, was not the Progressive position at Green Hills that she had occupied until her call to the colors. It appears that Progressive made a business decision to terminate its contractual relationship with Green Hills and that the decision was unrelated to Ms. Reynolds’ call to and return from military service. If Ms. Reynolds had not been called to active duty, she likely would have lost her Progressive position at Green Hills in any case.

It is important, now more than ever, that National Guard and Reserve (NG&R) personnel understand their rights under USERRA and other laws, and that they make intelligent decisions based on correct legal and other information. The purpose of the Service Members Law Center is to provide this information for all NG&R personnel, whether or not they are members of or eligible to join ROA. If you are eligible for ROA and not already a member, I will ask you to join, but I will not make ROA membership a condition precedent to my providing you information. Call me at 800-809-9448, extension 730, or e-mail me at [SWright@roa.org](mailto:SWright@roa.org).

As I explained in Law Review 0702 and Law Review 1040, I strongly advise that you *not* use your employer’s telephone, computer, e-mail system, or time when you are “on the clock” for your employer to contact me or anybody else to complain about your employer or to seek advice in dealing with your employer. I am generally available at ROA between 8 a.m. and 5 p.m. Eastern Time Monday through Friday. If you need to speak to me outside those hours, send me an e-mail and provide me your telephone number and the time you want me to call.

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