

LAW REVIEW 1043

Does a Merger Reset My Five-Year Clock? No.

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

1.1.1.9—Successor in Interest

1.3.1.2—Character and Duration of Service

Q: Since 1989, I have worked for Northwest Airlines as a pilot. My civilian career has been interrupted several times by both voluntary and involuntary military service, including an involuntary call-up in 1990-91 and two involuntary call-ups since Sept. 11, 2001. I have performed five active duty for special work (ADSW) periods, totaling just less than two years of service, as well as scores of drill weekends and annual training tours. I went on voluntary active duty in August 2007, and I am scheduled to leave active duty in August 2010.

I figure that I am very close to exhausting my five-year limit with Northwest, but in January 2010 Northwest merged with Delta. I figure that I now have a new employer and that my five-year clock is reset to zero as of January 2010. I want to stay on active duty for another year or two after August 2010, but I don't want to give up the right to reemployment with the airline. Do you agree that my five-year clock was reset to zero in January 2010?

A: No. "Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the *employer relationship* for which a person seeks reemployment, does not exceed five years." 38 U.S.C. 4312(c) (emphasis supplied).

As I explained in Law Review 1041 (June 2010), USERRA's definition of "employer" includes the "successor in interest" to your pre-service employer. It is clear that Delta qualifies as the successor in interest to Northwest. If you meet the USERRA eligibility criteria, including the five-year limit, you will have the right to reemployment with Delta. You cannot have it both ways. You cannot simultaneously argue that Delta is the successor in interest, so that you can have reemployment rights, but that Delta is your "new" employer, so that you receive a fresh five-year limit.

I invite your attention to Law Review 201, for a definitive discussion of what counts and what does not count toward exhausting your five-year limit. Your drill weekends and annual training tours and your three involuntary call-ups are exempted. Your five voluntary ADSW periods and your 36 months of voluntary active duty since August 2007 count toward your limit, unless your orders or your DD-214 contain the "magic words" that exempt these periods from the computation of the limit. You need to be very careful about any additional voluntary active duty, because you are apparently very close to exhausting your limit.

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 or 800-809-9448, ext. 730.