LAW REVIEW 1119

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USERRA and Public Sector Pension Plans

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

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Q: Our state's new Governor recently appointed me to head the state pension system. The system provides pension benefits for employees of the state and its counties, cities, school districts, etc. It is a traditional defined benefit plan, and it is woefully underfunded. I recently learned that, on top of all our other problems, we may also be responsible for pension benefits for current state employees for periods of time when they were away from work for military training or service. We just do not have the money to pay the promised benefits, even without regard to funding benefits for periods of time when employees were away from work for military service. I have talked to the unions representing state, county, municipal, and school district employees, and the unions are willing to waive the requirement to fund pension benefits for military service time. How do we go about getting exempted from these requirements?

A: Your system cannot be exempted from the requirement to comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA), which was enacted in 1994, and the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940 and superseded by USERRA in 1994. In the bargaining unit represented by a public sector union, veterans with rights under the VRRA and USERRA probably amount to less than 1% of the employees. Thus, it is not surprising, and also not relevant, that the union seeks to waive their rights, in order to maximize benefits for the other 99% of the employees.

Congress enacted the VRRA 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. A year later, as part of the Service Extension Act of 1941, Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees. The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress expanded the VRRA to make it apply to state and local governments as well.

In its first case construing the VRRA, 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 v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Section 4302 of USERRA (38 U.S.C. 4302) codifies this principle in the current reemployment statute. The collective bargaining agreement between the employer and the union can give the returning veteran *greater or additional rights,* but it cannot take away the veteran's federal statutory reemployment rights.

Q: I understand, but the bottom line is that the money is not there. The money set aside by employees and by the state and local governments was never enough to pay the promised benefits, and then in 2008 our investments took a big hit in the stock market crash. You cannot get blood from a stone.

A: If there is not enough money set aside to pay all the promised benefits, then all employees (including veterans) are going to have to "take a haircut" and suffer a proportional reduction in the benefits that have been promised. The actuarial problems of the pension plan make it all the more important that those employees who are

veterans receive credit for their military service time *before* their benefits are proportionately reduced, along with the other 99% of employees who are not veterans.

It is impermissible for you to contemplate balancing the pension benefit-asset imbalance on the backs of those who served our country in uniform. In *Fishgold,* the Supreme Court held that the reemployment statute is to be "liberally construed for he who laid aside his civilian pursuits to serve his country in its hour of great need." 328 U.S. at 285.

Q: Our state law does not provide for state pension credit for military service time. I am a state official, and I am bound to comply with state law. Paying these pension benefits for time not worked for the state and its political subdivisions would violate state law.

A: Under Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause"), federal statutes (including the VRRA and USERRA) trump conflicting state statutes and state constitutions. You are required to comply with federal law, regardless of what your state law says. If you insist on "making a federal case out of this" you will lose.

Q: Just what are our obligations under the VRRA and USERRA?

A: In *Fishgold,* the Supreme Court enunciated the "escalator principle" when it held that "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." 328 U.S. at 285. Section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies the escalator principle in the current reemployment statute. Section 4318 of USERRA (38 U.S.C. 4318) sets forth the application of the escalator principle to civilian employer pension entitlements (under defined contribution plans as well as defined benefits plans).

In 1977, the Supreme Court applied the escalator principle to benefits under a defined benefit plan. *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). Mr. Davis' 1936-71 career at the Alabama Power Co. was interrupted by World War II Army service, from 1943 to 1945. The Court held that Davis must be treated *as if he had been continuously employed* by the company during that 1943-45 service, meaning an additional $18 per month in his pension check. I discuss *Alabama Power* and its implications in Law Review 0915 (Apr. 2009).[1]

As I explained in Law Review 0766 and other articles, an individual must meet five eligibility criteria to have the right to reemployment under USERRA:

a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.

b. Must have given the employer prior oral or written notice.

c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, do not exceed five years.[2] *All* involuntary service and *some* voluntary service are exempted from the computation of the individual's five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count.

d. Must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.

e. Must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

If Joe Smith meets these criteria and returns to work for the state or one of its political subdivisions, Joe Smith must be treated *as if he had been continuously employed* during the time he was away from work for service.

Q: I know a state employee (let's call her Mary Smith) who served on active duty from 1995 to 1999, and who became a state employee in 2005. When she became a state employee, she purchased state retirement credit for her 1995-99 active duty. What are Mary's rights under USERRA?

A: Mary does not have rights under USERRA, because she did not leave a civilian job for the state to go on active duty in 1995. Her military service did not interrupt her civilian career as a state employee. Rather, her military service pre-dated the start of her state employee career. Mary's rights are under state law, not USERRA. Under section 4302(a) of USERRA [38 U.S.C. 4302(a)], USERRA does not supersede a state law that provides *greater or additional rights*.

Q: My lawyer says that our public employee pension plan is not covered by the federal Employee Retirement Income Security Act (ERISA). Why do I have to concern myself with federal law at all?

A: "Except as provided in subparagraph (B) [pertaining to the Thrift Savings Plan (TSP) for federal employees, and not pertinent to this discussion], in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) *or a right provided under any Federal or State law governing pension benefits for government employees,* the right to pension benefits of a person reemployed under this chapter shall be determined under this section." 38 U.S.C. 4318(a)(1)(A) (emphasis supplied).

Public employee pension plans are exempted from ERISA, but they are not exempted from USERRA.

Q: My lawyer tells me that these state employee-veterans cannot sue the state agency that I lead in federal court, because of the 11th Amendment of the United States Constitution. What do you have to say about that?

A: "In the case of such an action [to enforce USERRA] against a State (as an employer), the action shall be brought [by the Attorney General of the United States] in the name of the United States as the plaintiff in the action." 38 U.S.C. 4323(a)(1) (final sentence). The 11th Amendment does not bar a suit against a state by the United States. The Department of Justice has shown that it is most willing and able to sue states, and win, to make them comply with USERRA. With regard to the 11th Amendment issue, I invite the readers' attention to Law Reviews 89, 0848, 0918, 1011, 1014, and 1051.

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[1] I invite the readers' attention to www.roa.org/law_review. You will find more than 600 articles about the VRRA and USERRA and another 200 articles about the Servicemembers Civil Relief Act, the Uniformed and Overseas Citizens Absentee Voting Act, and other laws that are particularly pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] Under the VRRA, the service duration limit was four years. The VRRA eligibility criteria are otherwise similar.