LAW REVIEW 1120

Double Serving Not Double Dipping

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1.1.1.7—Application of USERRA State and Local Governments
1.3.2.3—Pension Credit for Service Time

Q: I am a public sector union official in a state that is in fiscal crisis. It appears that the state pension fund is grossly underfunded and that the state will not be able to pay all the benefits that have been promised to our union members, who are state employees. Some state employees have been called to active duty and have returned to state employment. The state is treating them as if they had been continuously employed in their state jobs during the time they were away from work in Iraq, Afghanistan, or elsewhere, and this has compounded the fiscal problems of the pension fund. Most of our union members think this is wrong. These service members receive retirement credit from the military for the time they serve on active duty. Why should they be permitted to get state employee retirement credit for the same period of time? This seems like "double dipping."[1]

A: The Uniformed Services Employment and Reemployment Rights Act (USERRA) requires any civilian employer (federal, state, local, or private sector) to reemploy a person who left a civilian job for voluntary or involuntary service in the uniformed services (anything from five hours to five years). Upon reemployment, the returning veteran must be treated, for seniority and pension purposes, as if he or she had remained continuously employed in the civilian job during the time that he or she was away from work for service.

Congress enacted USERRA[2] in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA can be found in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress expanded the law to make it apply to state and local governments as well.

The Supreme Court decided its first VRRA case in the immediate aftermath of World War II, and in that case the 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." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).

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.

Section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies the escalator principle in the current reemployment statute, and section 4318 (38 U.S.C. 4318) codifies the employer's "escalator" obligations with respect to civilian pension entitlements, including defined contribution plans as well as defined benefit plans. The returning veteran who meets the USERRA eligibility criteria[3] must be treated as if he or she had been continuously employed in the civilian job, for seniority and pension purposes.

It should be noted that most of the returning veterans who are reemployed under USERRA, and who are entitled to civilian pension credit for the military time, will never receive military retirement benefits. To qualify for a regular military retirement, one must serve on full-time active duty for at least 20 years. To qualify for the reduced Reserve Component (RC) retirement at age 60, one must have at least 20 "good years" of combined active duty and RC part-

time service. Most reemployed veterans do not stay in the military (full-time or part-time) long enough to qualify for military retirement benefits.

I know a man who graduated from college in 1985 and was commissioned a Second Lieutenant via Army ROTC. He served on active duty until 1989, when he left active duty and affiliated with the Army Reserve. He was called back to active duty in 1990-91 for service in Operation Desert Storm (the liberation of Kuwait). In the late 1990s, he was called back to active duty twice, for service in the former Yugoslavia. Then the terrorist attacks of Sept. 11, 2001 occurred, and it became clear that he would likely be called to the colors again. Although he was more than 75% of the way toward qualifying for the RC retirement at age 60, he bowed to overwhelming pressure from his civilian employer and his wife and resigned from the Army Reserve.

A significant minority of Guard and Reserve personnel will qualify for the age-60 retirement, and their active duty periods help them qualify for this benefit, but this should not be seen as "double dipping." When called to the colors, these individuals undergo risks that are many orders of magnitude greater than the risks that their colleagues back home at the civilian job endure. The least that we can do as a nation grateful for their service is to ensure that they not lose out on important benefits, as compared to those who remain at home and do not serve in uniform.

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. Senator Elbert Thomas of Utah conceived of the idea of requiring civilian employers to reemploy those who were drafted.[4] Senator Thomas offered an amendment to that effect during the STSA debate and convinced his colleagues to adopt it. He explained the rationale for his amendment as follows: "[I]t is not unreasonable to require the employers of such men [those who were drafted and necessarily left their civilian jobs] to rehire them upon completion of their service, since the lives and property of employers, as well as the lives and property of everyone else in the United States are defended by such service." 96 Cong. Rec. 10573 (remarks of Sen. Thomas), quoted in *Leib v. Georgia Pacific Corp.,* 925 F.2d 240, 246 (8th Cir. 1991).

The civilian employers and co-workers of those who are called to the colors, voluntarily or involuntarily, should be grateful that they have been protected by those who have served, and employers and co-workers (including members of your union) should not carp about the benefits that veterans receive upon returning to work.

It should also be noted that Congress has specifically provided that it is unlawful for a state to deny state retirement credit for a period of military service on the grounds that the individual is also receiving or will receive RC retirement credit for that same period of military service. *See* 10 U.S.C. 12736. *See also Cantwell v. County of San Mateo,* 631 F.2d 631 (9th Cir.), *cert. denied,* 450 U.S. 998 (1980). Congress has provided the age-60 retirement benefit as a way of providing an incentive to individuals to join the Reserve or National Guard and to remain available for a career. Congress has specifically precluded the states from undermining this federal incentive by denying RC personnel civilian retirement credit for military service periods.

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[1] This set-up is fictitious.

[2] Public Law 103-353, 108 Stat. 3149 (Oct. 13, 1994).

[3] The individual must have left a civilian position of employment in order to perform uniformed service and must have given the employer prior oral or written notice. He or she must have been released from the period of uniformed services without having exceeded the cumulative five-year limit and without having received a punitive or other-than-honorable discharge and must have made a timely application for reemployment after release from service. Please see Law Review 0766, a primer on USERRA. I invite the readers' attention to www.roa.org/law_review, where you will find more than 600 articles about the VRRA and USERRA and another 200 articles about the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are particularly pertinent to those who serve our nation in

uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[4] A year later, as part of the Service Extension Act (Public Law 77-213, 55 Stat. 626, 627), Congress expanded the reemployment provision to make it apply to voluntary enlistees as well as draftees.