

LAW REVIEW 1123

The Case of the Misplaced Parentheses: Punctuation can impact USERRA five-year rule.

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

1.3.1.2 - Character and Duration of Service

1.8 - Relationship Between USERRA and Other Laws/Policies

The Uniformed Services Employment and Reemployment Rights Act (USERRA) includes among its criteria a five-year limit for those looking to return to a former job. But applying that particular criterion is proving an interesting challenge for one ROA member.

The member, who we'll call "Joe Smith," graduated from the U.S. Air Force Academy and was commissioned a second lieutenant in 1976. He remained on active duty for nine years and left active duty as a captain in 1985. He then joined the Army National Guard as a traditional National Guard member. In 1987, he went on full-time Active Guard and Reserve (AGR) duty for six years.

The Berlin Wall fell in 1989, and the Soviet Union imploded in 1991. With the end of the Cold War, Congress concluded that the nation's military forces could be cut substantially; it was called the "peace dividend." But Congress also believed it should accommodate those who had been on active duty with a reasonable expectation of serving for a career and earning a military retirement. As a result, Congress provided several incentive programs for individuals in this category. One such program was Temporary Early Retirement Authority (TERA).

Joe took advantage of the TERA incentive and retired from the Army National Guard in 1993, with 15 years of active duty. He then took a federal civilian job for the Department of Interior (DI). The Sept. 11, 2001, terrorist attacks challenged the assumption that the nation could get by with a much smaller military. Joe had developed some special skills in his 15 years of active duty, and the demand for them increased after 9/11.

In late 2002, just before the March 2003 invasion of Iraq, the Army asked Joe to return to active duty. (This was not an involuntary recall, but Joe was told that his nation needed him, and he agreed to return to active duty for two years.) He gave proper notice to DI and reported to active duty; he served for a year in Iraq and has remained on active duty under several extensions. In early 2011, he will leave active duty and end his military career, this time forever. He wants to return to his DI job, but the five-year USERRA limit is at issue.

When Joe returned to active duty in 2003, his orders did not cite a specific section of Title 10 of the United States Code (U.S.C.). He asked about the pertinent section and was informed, in writing, that his orders were under the authority of "10 U.S.C. 688(a)." Recently, he learned that, in fact, his orders have been under "10 U.S.C. 688a." They might appear the same, but the parentheses around the "a"—or lack thereof—make quite a difference.

As explained in Law Review 0766 and other articles, USERRA allows reemployment to a person who meets USERRA eligibility criteria. The person must have left a position of civilian employment (federal, state, local, or private sector) for service in the uniformed services and must have given the pre-service employer prior oral or written notice. After service, the person must have been released from service without exceeding the five-year limit and without having received a punitive (court martial) or other-than-honorable discharge. The person also must make a timely application for reemployment after release from the period of service. When released from active duty in early 2011, Joe will clearly meet these criteria, with the possible exception of the five-year limit.

Set forth in 38 U.S.C. 4312(c), USERRA's five-year limit applies "with respect to the employer relationship for which a person seeks reemployment." Joe began his employment with the federal government as a civilian after retiring from the Army National Guard in 1993. Thus, his nine years of Air Force active duty (1976–1985) and six years of National Guard AGR duty (1987–1993) are irrelevant for USERRA purposes.

Joe's five-year clock under USERRA started ticking in 2003 when he returned to active duty, but section

4312(c) has eight statutory exemptions—kinds of service that do not count toward the individual's five-year limit with respect to an employer relationship. One is section 4312(c)(4)(A), which provides that service of an individual "ordered to, or retained on, active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10" does not count toward the individual's five-year limit.

Because section 688 is one of the Title 10 sections specifically enumerated in section 4312(c)(4)(A), and because the Army had officially informed him (by letter) that his orders were under section 688, Joe—not unreasonably—concluded that his post-2003 duty was exempted from the five-year limit. He relied upon that understanding when he extended his active duty beyond the two-year period that he initially agreed to perform in 2003. Now that we know that his orders were under 10 U.S.C. 688a, rather than 10 U.S.C. 688(a), Joe has a problem with the five-year limit, as section 688a is not one of the Title 10 sections mentioned in section 4312(c)(4)(A) of USERRA.

All federal laws of permanent or indefinite significance—everything other than private relief bills and the like—are codified in the U.S. Code, which has 50 titles (broad subject areas). Title 10 is "armed forces" and Title 38 is "veterans' affairs." USERRA is in Title 38, from section 4301 to 4335.

Within a title in the U.S. Code, there are sections, numbered consecutively. Some titles are crowded, and Congress has enacted sections that are numbered with numbers and letters, like 10 U.S.C. 688a. The heading of section 688 is "Retired members: authority to order to active duty; duties." The heading of section 688a (the next section consecutively in Title 10) is "Retired members: temporary authority to order to active duty in high-demand, low-density assignments."

Section 688(a) is subsection (a) of section 688. Section 688a is a separate section of Title 10. Yes, it does make a difference, especially to Joe.

In addition, 38 U.S.C. 4312(c)(4)(D) excludes from the computation of the five-year limit service performed by a member who is "ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services," emphasis added. The term "Secretary concerned" means the Secretary of the Army, with respect to matters concerning the Army. See 10 U.S.C. 101(a)(9)(A).

Department of Defense regulations implementing USERRA provide that the authority to make determinations under the subsections of section 4312(c) (pertaining to exemptions from the five-year limit) may be delegated by the service secretary, but not below the assistant secretary level. With respect to the Army, the Army National Guard, and the Army Reserve, the authority to make these determinations has been delegated to the assistant secretary of the Army for Manpower & Reserve Affairs. Joe must have that official make the necessary determination, and the determination should be added to the DD-214 that he will receive when he leaves active duty. With such a determination, Joe can come in under the five-year limit and have reemployment rights in his DOI job. Without such "magic words" on his orders or his DD-214, Joe will not have the right to reemployment because his post-2003 active duty has exceeded five years.