

LAW REVIEW 1125

Furloughs and the Five-Year Limit

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

1.1.2.3—USERRA Applicability to Employees Who Have Been Laid Off

1.3.1.1—Left Job for Service and Gave Prior Notice

1.3.1.2—Character & Duration of Service

Q: I served on active duty for 11.5 years until released in December 2000. The next month, I started work for a major airline as a rookie pilot. I was a junior first officer (co-pilot) when the terrorist attacks occurred on Sept. 11, 2001. As a result of the attacks, the air travel industry took a serious downturn. Because there was a reduced demand for seats, the airline reduced the number of flights, which in turn reduced the need for pilots. In accordance with the collective bargaining agreement between my union and the airline, layoffs or “furloughs” (as they are called in the airline business) are based strictly on seniority, and so are recalls from furlough. I was very junior, and I was among the first pilots furloughed. I was told that the furlough would likely last for several years.

I returned to active duty in January 2002 and I am still on active duty. I expect to leave active duty, by retirement, in the fall of 2011. I want to return to work for the airline.

In January 2007, my number for recall from furlough finally came up. I received a certified letter from the airline, inviting me to return to work. I responded by certified letter, informing the airline that I wished to respond affirmatively to the recall notice but that I was on active duty and was unable to get off active duty immediately. Pursuant to my request, the airline put me on a “military leave” status in January 2007.

I have read your Law Review 0766, and I think that I will meet the five eligibility criteria for reemployment under USERRA, with the possible exception of the five-year limit. I gave the employer written notice by certified mail when I received a recall notice from the airline. I expect to leave active duty without a punitive or other-than-honorable discharge, and I plan to apply for reemployment with the airline the day after I leave active duty.

The issue is the five-year limit. I think that my limit should be measured from January 2007, when I received the airline’s recall notice. I have inquired of the airline’s personnel office, and they tell me that my five-year limit is measured from January 2002, when I returned to active duty. Is January 2007 the start point for the computation of my five-year limit? Or is it January 2002?

A: I decided to write this article because I have received this question, in many variations, from a large number of reservists, especially in the airline industry but also in some other industries.

I invite your attention to section 4312(a) of USERRA: “Subject to subsections (b), (c), and (d) and to section 4304, *any person whose absence from a position of employment is necessitated by reason of service in the uniformed services* shall be entitled to reemployment rights and benefits and other employment benefits of this chapter if [eligibility criteria then set forth].” 38 U.S.C. 4312(a) (emphasis supplied).

In the period between January 2002 and January 2007, your absence from your job at the airline was not necessitated by your uniformed service. During that period of time, your absence from the civilian job was necessitated by the furlough. Accordingly, it is reasonable to argue that your five-year limit should be measured from January 2007, when you received the airline’s recall notice. But I acknowledge that this issue is not free from doubt.

I have also reviewed USERRA's legislative history, the Department of Labor USERRA regulations, and the case law under USERRA and the prior reemployment statute. I do not find anything that touches upon this very specific question.

USERRA's legislative history does contain the following instructive paragraph: "The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protections against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.' See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977)." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.

Applying USERRA liberally for the benefit of those who serve our country in uniform, like you, I think that it is fair to argue that your five-year limit should be measured from January 2007 rather than January 2002.

Q: Before I returned to active duty in January 2002, I informed the airline's chief pilot by telephone and also by e-mail. I have been searching my e-mail, but I cannot find a copy of the e-mail that I sent more than nine years ago, and the chief pilot died in 2007. The airline's personnel office insists that there is no record that I notified the airline before I went on active duty in 2002, and that this lack of notice is an additional reason to deny my upcoming application for reemployment. What do you think?

A: Under section 4312(a)(1) of USERRA, the notice to the employer, of impending uniformed service, can be "written or verbal." 38 U.S.C. 4312(a)(1). In a civil case, the standard is "preponderance of the evidence" rather than "beyond a reasonable doubt" as in a criminal case. If you testify under oath that you gave prior notice to the chief pilot by telephone and by e-mail, and if the judge or jury credits your testimony, you can prevail on the notice issue.

Moreover, you can reasonably argue that prior notice was not required in January 2002 because the service did not cause you to be absent from your civilian employment. You were already absent, because you had been furloughed.

It would have cost you about \$3 to send a certified letter to the airline in January 2002. In retrospect, it would have been better if you had sent such a letter, and if you had retained a copy of the letter, along with the United States Postal Service paperwork showing that you sent the letter and that the airline received it.