

Law Review 1157

LAW REVIEW 1157

How Do I Prove My "Escalator" Case?

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

1.3.2.2—Continuous Accumulation of Seniority—Escalator Principle

Q: I am a Captain in the Army Reserve and a member of ROA. I have found your "Law Review" articles to be most helpful. I was called to active duty in July 2008, for one year. I extended voluntarily for another two years. I was released from active duty in July 2011 and returned to work a month later. I have followed your advice to "dot the i's and cross the t's."

I can document that I have met the five eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I left my job in July 2008 to report to active duty as ordered. I gave both oral and written notice to my direct supervisor and to the employer's personnel office. I sent a certified letter to the personnel office. I kept a copy of the letter, along with the United States Postal Service green postcard, showing that the employer received my letter. I am well within the five-year limit, and I was released from active duty honorably. I made a timely application for reemployment, both orally and by certified mail.

I started work for the employer (a local police department) in July 2002, along with 19 other rookie police officers who graduated from the police academy at that time. I received very good performance evaluations during the six years between July 2002 and July 2008 (when I reported to active duty). While I have not seen the performance evaluations of my July 2002 classmates (Performance evaluations are treated as confidential.), I believe that I was rated at or near the top of my peers, before I was called to the colors.

I was promoted twice in the six years between 2002 and 2008, and when I left for military service in July 2008 I was ahead of all but four of the 20 police officers in the July 2002 class. Those other four were essentially tied with me, having been promoted twice in six years.

When I returned to work in August 2011, I found myself at the same level where I had been in July 2008, more than three years earlier. Using my 2002 classmates as a benchmark, consider that I was in the top five when I deployed in 2008 but upon returning in 2011, I found myself in the bottom three. At this point, the only two officers behind me graduated at the bottom of the class in July 2002 and have had several disciplinary infractions since.

If I had not been called to the colors for the 2008-11 period, I certainly would have received at least one promotion and likely two. I have complained to the city's personnel department, asserting that under the "escalator principle" I am entitled to at least one and maybe two promotions, upon reemployment. The

personnel department and the city attorney told me that the “escalator principle” does not apply here because these are “merit promotions” and not “seniority promotions.” What do you think?

A: Based on the facts as you have described them, I think that you have a strong case. You are wise to document carefully your compliance with the five USERRA eligibility criteria.

Congress enacted the reemployment statute 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. The first reemployment rights case reached the Supreme Court just a few months after victory was achieved, and in that case the Court enunciated the “escalator principle” when it held: “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, 284-85 (1946).

Congress substantially rewrote the reemployment statute in 1994, as USERRA, and codified the “escalator principle” as follows: “A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.” 38 U.S.C. 4316(a).

Section 4331 of USERRA gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Secretary promulgated such regulations in 2005. The regulations are codified in title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). Two sections of the USERRA Regulations are particularly pertinent here.

§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?

A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

- (a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
- (b) Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,
- (c) Whether it is the employer's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer's actual custom or practice is different from what is written in the contract or handbook.

20 C.F.R. 1002.212.

§ 1002.213 How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.

20 C.F.R. 1002.213