LAW REVIEW[1] 12052
May 2012

Contractual Statute of Limitations Under USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
About Sam Wright

1.2—USERRA Forbids Discrimination
1.3.1—Eligibility Criteria for Reemployment
1.3.1.2—Character & Duration of Service
1.3.2.2—Continuous Accumulation of Seniority—Escalator Principle
1.3.2.12—Special Protection against Discharge, except for Cause
1.4—USERRA Enforcement
1.5—USERRA Arbitration
1.6—USERRA Statutes of Limitations
1.8—Relationship between USERRA and other Laws/Policies
4.7—SCRA Extension of Statutes of Limitations and Redemption Periods

---

[1]I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

***Oswald v. BAE Industries, Inc.,* 483 Def. Appx. 30 (6th Cir. 2012).**

"If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA] alleging a violation of this chapter, there shall be no time limit on the period for filing the complaint or claim." Title 38, United States Code, section 4327(b) [38 U.S.C. § 4327(b)]. Congress added section 4327 to USERRA by legislation signed into law by the President on October 8, 2008.

"This chapter [USERRA] supersedes any State law (including any local law or ordinance), *contract, agreement,* policy, plan, practice or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of *additional prerequisites* to the exercise of any such right or the enjoyment of any such benefit." 38 U.S.C. § 4302(b) (emphasis supplied).

The United States Court of Appeals for the Sixth Circuit[3] decided this case on May 14, 2012. The decision is marked "not recommended for full-text publication" but because of computerized legal research services like LEXIS® and WESTLAW® the distinction between "published" and "unpublished" cases is far less important than it was when I attended law school.[4]

Jerome R. Oswald is a member of the Marine Corps Reserve. He began working for the defendant BAE Industries, Inc. in August 2005, as a manufacturing engineer. Just 11 months later, he was called to active duty and deployed to Iraq. He returned from active duty in July 2007. It appears that he met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), in that he gave prior notice to the employer, did not exceed the USERRA five- year limit, was released from active duty without a disqualifying bad discharge under 38 U.S.C. 4304, and made a timely application for reemployment after release from the period of service.[5]

Because Oswald met the USERRA eligibility criteria, he was entitled to be reemployed "in the position of employment in which the person [Oswald] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." 38 U.S.C. § 4313(a)(2)(A).

Oswald was a manufacturing engineer during the 11 months that he worked for BAE, until he was called to the colors in July 2006. It seems likely that if he had not left his job for military service, he would still have been a manufacturing engineer in July 2007. However, when he returned to work after his service, Oswald was placed into a position of lesser status than the

---

[3]The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[4]I started at the university of Houston law School in 1973 and earned by JD degree in 1976 and then reported to active duty in Navy Judge Advocate General's Corps.

[5]Since this period of active duty was involuntary, it did not count towards Oswald's five-year limit with respect to BAE. *See* 38 U.S.C. § 431(c)(4).

position he left and presumably would have kept. In August 2007, one month after returning to work, he was downgraded again, from manufacturing to maintenance, and transferred to a different BAE facility. In September, BAE terminated his employment.

Section 4316(c) of USERRA [38 U.S.C. § 4316(c)] makes it unlawful for an employer to discharge a returning veteran within one year after his or her reemployment following a period of service of 181 days or more, as in this case. Since Oswald was fired within this special protection period, the employer (BAE) should have been required to prove that the firing was for cause.

On July 10, 2010 (almost three years after the firing), Oswald sued BAE in the United States District Court for the Eastern District of Michigan, contending that the company violated USERRA when it reinstated him in a lesser position than the position he left and presumably would have maintained upon returning from deployment. There has been no adjudication of Oswald's claim that the company violated USERRA because the District Court held and the 6th Circuit affirmed that Oswald's suit was untimely under a six-month *contractual* statute of limitations.

When Oswald was hired by BAE in August 2005, he was required to sign, as a condition of employment, several forms drafted by the company and its lawyers. One form that he signed provided that if he ever had a dispute with BAE arising from his employment, there would be a six- month statute of limitations and that any claim not formally initiated within six months was time- barred.

Section 4327(b) of USERRA provides that there shall be *no statute of limitations* on the filing of a USERRA claim, but this provision was not enacted until October 8, 2008. The 7th Circuit has held that this "no statute of limitations" rule *is not retroactive* and does not apply to USERRA causes of action that accrued prior to October 8, 2008.[6] *See Middleton v. City of Chicago,* 578 F.3d 655, 662-65 (7th Cir.2009).[7] Oswald's cause of action for the firing accrued in September 2007, when he was fired, so the 2008 amendment does not apply to his claim.

Prior to the 2008 amendment, USERRA did not contain a statute of limitations, and it had a provision specifically precluding the application of state statutes of limitations, but several courts had held that the four-year default statute of limitations under 28 U.S.C. § 1658(a) applied to USERRA cases. Section 1658(a) provides:

> (a)Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

[6]The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[7]I discuss the implications of *Middleton* in detail in law Review 0948.

28 U.S.C. § 1658(a).

Congress enacted this provision on December 1, 1990.

Oswald's cause of action for the firing accrued in September 2007, and the four-year statute of limitations under 28 U.S.C. § 1658(a) did not expire until September 2011. Oswald filed suit against BAE in July 2010, and thus his claim was timely under the four-year statute of limitations in effect at the time, but the District Court and the 6th Circuit held that the much shorter contractual statute of limitations barred Oswald's claim.

I think that applying the six-month contractual statute of limitations violates section 4302(b) of USERRA, which provides that USERRA supersedes a contract or agreement that purports to limit USERRA rights or to impose an additional prerequisite on the exercise of USERRA rights. Unfortunately, the 6th Circuit (like the 5th Circuit) has made a distinction between *substantive* rights (which cannot be given up in advance in an agreement or contract) and *procedural* rights (which can be waived in advance).[8] *See Landis v. Pinnacle Eye Care, LLC,* 537 F.3d 559, 562 (6th Cir. 2008), *citing Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672, 677-78 (5th Cir. 2006).

The distinction between procedural and substantive rights is not supported by the language of section 4302(b). I think that USERRA supersedes contracts and agreements that limit both procedural and substantive rights. USERRA's legislative history and the "additional prerequisites" language of section 4302(b) militate against the procedural-substantive distinction that the 6th Circuit and the 5th Circuit have made.[9] In *amicus curiae* briefs and oral arguments, Colonel John Odom and I strenuously arguedthispoint.[10] TheUnitedStatesDistrictCourtfortheNorthernDistrictofTexasacceptedthis argument, but unfortunately the 5th Circuit and later the 6th Circuit rejected it.[11]

---

[8]The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from courts in Louisiana, Mississippi, and Texas.

[9]*Merriam-Webster Dictionary and Thesaurus* defines "perquisite" as "something required beforehand or for the end in view."

[10]You can find our briefs reprinted immediately after Law Review 149 on our website: No. 149, *You Are Not Required To Arbitrate Your USERRA Complaint*; No. 149-UPDATE, *USERRA Victory in Dallas Federal Court Case*; ADDENDUM to No. 149, *Court Opinion-Garrett v. Circuit City*; Supplement to No. 149 (April 2005), *Amicus Curiae Brief - re, Defendant's Motion To Compel Arbitration;* Supplement to No. 149 (June 2005)*, ROA Amicus Curiae Brief in support of plaintiff*.

[11]Please see Law Review 1191 (October 2011). *Garrett* and *Landis* are about the procedural-substantive distinction in the context of an agreement to submit future disputes to binding arbitration, while *Oswald* is about an agreement that contains a statute of limitations that is shorter than the statutory limit. The factual context is slightly different, but the legal issue is the same.

In its first case construing the reemployment statute, the Supreme Court held that this statute is to be liberally construed for the benefit of those who have laid aside their civilian pursuits to answer the country's call in its hour of great need. *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). USERRA's legislative history makes clear that Congress intended that this "liberal construction" should apply to cases arising under USERRA, the 1994 rewrite of the 1940 law before the Court in *Fishgold. See* House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452. The procedural-substantive distinction is inconsistent with the liberal construction that Congress and the Supreme Court intended.[12]

In *Oswald,* the 6th Circuit quite properly avoided answering the question of how section 4327(b) of USERRA would affect this question if the cause of action had accrued on or after October 8,
2008. Under longstanding rules of jurisprudence, a court is to answer only those questions that it needs to answer in order to decide the case before it, and in *Oswald* it was clear that the cause of action for the firing had accrued prior to the effective date of section 4327(b).

The 6th Circuit has thus left for another day the question of whether BAE's contractual six-month statute of limitations can be applied to a USERRA cause of action that accrues today, after October 8, 2008. If the contractual statute of limitations still applies, this is a very important question that needs to be addressed in court and perhaps by Congress, in enacting a new USERRA amendment.

In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA), as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which dates back to 1917. The SCRA is codified in title 50 Appendix of the United States Code, sections 501 through 597b (50 U.S.C. App. 501-
597b). The SCRA provides as follows concerning the tolling of statutes of limitations during an individual's active military service:

> The period of a servicemember's military service may not be included in computing any period limited by *law, regulation, or order [It does not say "contract."]* for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, or assigns.

50 U.S.C. App. § 526(a) (emphasis supplied).

Let me change the facts slightly to illustrate my concern. Joe Smith, a member of the Army National Guard, works for BAE. On June 1, 2012, Smith informs his BAE supervisor that he is being called to active duty for a year, from September 1, 2012 to August 31, 2013. Not wanting

[12]This argument was forcefully made to both the 5th Circuit and the 6th Circuit, but unfortunately both appellate courts have rejected the argument. The other circuits have not yet addressed this specific question.

to deal with finding a temporary replacement for Smith, for one year until he returns from mobilization, BAE fires Smith on August 1, 2012, one month before his expected departure for active duty.

This firing is a violation of 38 U.S.C. § 4311(a), if Smith can prove that BAE's decision to fire him was motivated, at least in part, by his obligation to perform uniformed service.[13] The press of preparation for mobilization precludes Smith from finding a lawyer and filing suit before or during his active duty period. On September 1, 2012, Smith reported to active duty for a month of intense training followed immediately by deployment to Afghanistan for 11 months.

Smith is released from active duty on August 31, 2013, and then immediately applies to BAE for reemployment, which BAE denies—BAE's position is that Smith was fired a month before his active duty period began so he does not have the right to reemployment. Smith promptly sues BAE in October 2013. The company argues that the USERRA claim is barred by the six-month statute of limitations under the "agreement" that Smith signed, as a condition of employment, when he was hired by BAE. The company argues that the SCRA provision on tolling of statutes of limitations does not apply to *contractual* statutes of limitations and that the deadline for Smith to file suit expired eight months before Smith returned from active duty.

In summary, the *Oswald* case is wrongly decided, and it points to the need for a USERRA amendment clarifying that section 4302(b) of USERRA supersedes contracts and agreements that impose either procedural or substantive limitations on USERRA rights.

Update – March 2022[14]

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.[15] The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant section cited throughout the article can be found at:

50 U.S.C. App. § 526 discussing the statute of limitations can be found at 50 U.S.C. § 3936.

---

[13]The proximity in time between the firing and Smith's expected and announced mobilization date may be sufficient, in and of itself, to prove unlawful employer motivation.

[14]Update by Second Lieutenant Lauren Walker, USMC.

[15]*The Servicemembers Civil Relief Act (SCRA),* THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (last visited Mar. 10, 2022).

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved.*[16]

Please join or support ROA

This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight[17] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE

[16]Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).
[17]Congress recently established the United States Space Force as the 8th uniformed service.