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Civilian Pension Credit for Military Service Time before 1994

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Q: I have read with interest your “Law Review” articles at www.servicemembers-lawcenter.org. I am trying to discern if the Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to me.

I was born in 1947 and I graduated from high school in May 1965. Just a month later, I went to work for a major corporation, with a defined benefit pension plan. I remained with the company until June 1967, when I was drafted. I served on active duty for almost two years, including a year in Vietnam, and I was honorably discharged in May 1969. I immediately applied for reemployment at the company, and I went back to work in June 1969.

I remained with the company for six more years, until I resigned in June 1975. I was told that I would qualify for a pension from the company, as of my 65th birthday. I turned 65 recently, and I applied for the pension. The company personnel office told me that I qualify for a very modest pension, based on six years of company service, from June 1969 to June 1975.

I responded, suggesting that under USERRA I am entitled to credit for the two years that I worked for the company before I was drafted plus the two years that I was on active duty, so that I am entitled to a pension based on ten years of company service, rather than six. The company claims that I have no such right because Congress did not enact USERRA until 1994. What do you think?

A: The employer is correct that USERRA was not enacted until 1994, but you have the right to pension credit for your military service time under the prior reemployment statute. Congress enacted USERRA (Public Law 103-353) on October 13, 1994.

USERRA was a complete rewrite of and replacement for the Veterans’ Reemployment Rights (VRR) law, which can be traced back to 1940. Please see Law Review 104 for a comprehensive history of the reemployment statute. In Law Review 89, I discuss the effective date of USERRA and the transition rules from the VRR law to USERRA. Vested rights under the prior law are preserved.

USERRA is codified in Title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). The VRR law was formerly codified at 38 U.S.C. 2021-2026. In its first case construing the VRR law, the Supreme 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).

Three decades later, the Supreme Court applied the escalator principle to pension entitlements under a defined benefit plan. *See Alabama Power Co. v. Davis*, 431 U.S. 581 (1977). Mr. Davis’ career at the Alabama Power

Company was interrupted by 1943–45 military service. He was re-employed in 1945, after his honorable discharge, and he retired from the company in 1971. The Supreme Court held that he was entitled to continuous pension credit from 1936 (when he began his career at the company) to 1971, because his 1943–45 military service should not interrupt his pension credit.

It does not matter that *Alabama Power Co.* was decided by the Supreme Court eight years after you returned from military service, in 1969. The Supreme Court did not establish a new rule in 1977. Rather, the Supreme Court clarified what the rule had always been.

So the bottom line is that you are entitled to continuous seniority credit from June 1965 to June 1975, without interruption for your two years of active duty. This entitlement is under the VRR law, not USERRA. This assumes, of course, that you can establish that you met the VRR law's eligibility criteria for reemployment in June 1969. You must establish that you left your civilian job for military service, that you did not exceed the VRR law's four-year limit on the duration of service, that you were honorably discharged from service, and that you made a timely application for reemployment with your pre-service civilian employer.

When you were discharged from the Army in May 1969, you received a DD-214, showing the dates of your entry on and release from service and that your service was honorable. If you cannot find the document that you were issued 43 years ago, you can order another copy at <http://www.archives.gov/veterans/military-service-records/>.

The DD-214 will establish the date that you entered active duty, in June 1967. The company's personnel records will likely show that you were working at the civilian job until just a few days before the date that you reported for induction. This proximity in time will establish that your purpose for leaving the job, in June 1967, was for military service.

The DD-214 will establish the date that you were honorably discharged from the Army, in May 1969. Under the VRR law, you had 90 days to apply for reemployment, after release from active duty. The company's personnel records will likely establish that you returned to work well within this 90-day period. These records clearly establish that you met the VRR law's eligibility criteria for reemployment in June 1969.

Q: The company claims that I did not notify them of my induction before I left work in June 1967. I specifically recall that I notified my direct supervisor, but he has been dead for more than a decade. How can I establish, 45 years later, that I gave notice in June 1967?

A: You are not required to prove that you gave prior notice, because prior notice was not required under the VRR law. *See Lapine v. Town of Wellesley*, 304 F.3d 90 (1st Cir. 2002). Under section 4312(a)(1) of USERRA, 38 U.S.C. 4312(a)(1), prior notice to the employer is required, unless giving prior notice is precluded by military necessity or otherwise impossible or unreasonable, but USERRA does not apply to your situation.

Q: If the company still refuses to credit my two years of military service, and the two years that I worked for the company before I was drafted, in computing my pension entitlement, what remedy is available to me?

A: You can file suit against the employer in the United States District Court for any district where the employer maintains a place of business. If you cannot find a lawyer who understands the reemployment law and is willing to represent you, I can help you find such a lawyer.

Q: The employer insists that I cannot sue because too much time has elapsed since I returned from service and returned to work, in June 1969. What do you say about that?

A: You only recently turned 65 and became eligible for the pension. If you received your first pension payment in July 2012, and if that payment was less than it should have been because you were not credited for your two years of military service, then July 2012 marks the accrual of your claim, and your claim is not untimely.